92-1450

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

**CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,**

*Petitioners,*

v.

**CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,**

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a public employer that terminates an employee based on credible, substantiated reports of unprotected, insubordinate speech may be held liable for retaliatory discharge under the First Amendment if it is later shown that the reports were inaccurate and that the employee actually spoke on protected matters of public concern, when the employer's ignorance of the protected speech is the result of an incomplete investigation.

2. Whether in January 1987, public officials were immune from liability for discharging an employee based on credible, substantiated reports of unprotected, insubordinate speech that were later shown to be inaccurate—because (a) it was clearly established that insubordinate speech was not protected by the First Amendment and (b) it was not clearly established that public officials had a duty to investigate beyond interviewing the reporter of the speech three times and the recipient of the speech once and allowing the discharged employee an opportunity to discuss the speech in question.[1]

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[1] Fairly comprised within these questions is the issue of whether the Seventh Circuit in part based its holding on assertions by plaintiff wholly unsupported by the record. Thus, if this case is accepted for review, Petitioners anticipate raising a third question, which may be stated as follows: "Whether, in opposing summary judgment, plaintiff Churchill presented sufficient evidence to sustain a jury verdict in her favor on her claims that she engaged in protected speech and that her protected speech was a motivating factor in defendants' decision to discharge her."

## LIST OF PARTIES

The parties to the proceedings below were the petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital and the respondents Cheryl R. Churchill and Thomas Koch, M.D.

## RULE 29.1 STATEMENT

Defendant McDonough District Hospital is an Illinois municipal corporation. It has no parent or subsidiary corporations.



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## APPENDIX





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**Statutes and Rules**



IN THE

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## PETITION FOR WRIT OF CERTIORARI

The Petitioners Cynthia Waters, Kathleen Davis, Stephen Hopper and McDonough District Hospital respectfully request that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on October 15, 1992 and December 9, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 977 F.2d 1114 and is reprinted in the Appendix at App. 1. The order of the Court of Appeals for the Seventh Circuit denying defendants' peti-

tion for rehearing and suggestion for rehearing in banc is reprinted in the Appendix at App. 30.

The order of the United States District Court for the Central District of Illinois awarding defendants summary judgment as to plaintiff Cheryl Churchill's ("Churchill") First Amendment retaliatory discharge claim and dismissing both plaintiffs' freedom of expressive association claims under Rule 12(b)(6) has not been reported. It is reprinted in the Appendix at App. 31. The district court's earlier order granting defendants' motion for summary judgment as to Churchill's Fourteenth Amendment due process claims is reported at 731 F. Supp. 311 and is reprinted in the Appendix at App. 51.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 15, 1992. A timely petition for rehearing was denied on December 9, 1992.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



U.S. Const. Amend. 14. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

> Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

In this Section 1983 action, Churchill claims that defendants violated her First Amendment rights by firing her in retaliation for comments she allegedly made about the Hospital's policy of cross-training nurses in departments to which they were not regularly assigned. She also claimed that the individual defendants' conduct violated her Four-

teenth Amendment and contractual rights to due process.[2] The following facts are material to consideration of the questions presented by this petition:

On January 16, 1987, Mary Lou Ballew ("Ballew"), a registered nurse regularly assigned to the Hospital's Obstetrics ("OB") Department, where Churchill also worked, overheard comments made by Churchill to fellow nurse Melanie Perkins-Graham ("Graham"), a cross-trainee, during a conversation in the Department's kitchen area. (Supp. A. 53-55, 59-60).[3] Upset by what she heard, Ballew approached the OB Department's nursing supervisor, Defendant Cynthia Waters ("Waters"), and informed her that "Cheryl took Melanie the cross-trainee into the kitchen for a period of at least 20 minutes to talk about you [Waters] and how bad things are in OB in general." (Supp. A. 67-68, 213-16). Ballew construed those portions of the conversation she heard as "negative and intended to dampen the enthusiasm of" Graham, and she characterized the conversation this way when she reported it to Waters. (S.A. 31; Supp. A. 60-61).

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[2] By order dated February 16, 1990, the district court granted defendants' motion for summary judgment as to these claims, finding that Churchill had no contractual right to (and thus no property interest in) continued employment. App. 70, 73. By the time the district court disposed of this case, Dr. Thomas Koch ("Koch") had been added as a party-plaintiff who claimed that defendants retaliated against him for his opposition to the cross-training policy. Koch's claim was dismissed for failure to present a justiciable controversy. App. 39-41. In the Seventh Circuit, plaintiffs did not raise any issue as to dismissal of Koch's claim.

[3] Citations to the record below are designated as follows: References to the Short Appendix bound with Plaintiffs' Brief are designated "S.A." References to the Supplemental Appendix filed by Defendants are designated "Supp. A."



Waters communicated Ballew's report to the Hospital's Vice President of Nursing, Defendant Kathleen Davis ("Davis"), and they decided to meet with Graham to determine whether Ballew's report was accurate. (Supp. A. 220-22). On January 23, 1987, Waters and Davis met with Graham and her supervisor. (Supp. A. 223-27). At this meeting, Graham reported that Churchill (1) "said unkind and inappropriate negative things about Cindy Waters;" (2) "had discussed her evaluation quite a bit;" (3) "stated that Waters had wanted to wipe the slate clean and have things get better but this wasn't possible;" (4) "stated that just in general things were not good in OB and Hospital administration was responsible;" and (5) "stated that Kathy was ruining MDH [the Hospital]." (App. 6-7; Supp. A. 72-78, 93, 228-29).[4] Churchill has conceded that Waters and Davis *never* were informed that Churchill had discussed cross-training with Graham. App. 22 (noting that *Churchill "alleges* . . . they were unaware of the actual content of her January 16, 1987 conversation") (emphasis added).

On January 26, 1987, Waters again spoke with Ballew, who said that in the conversation with Graham, Churchill (1) "was knocking the department;" (2) had stated that

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[4] At her deposition, Graham confirmed the accuracy of Waters's and Davis's accounts of their interview with Graham. She also described Churchill's comments as follows: (1) "the overall message was not a positive one as far as her relationship with Cindy;" (2) [Churchill] "shar[ed] with me about her evaluations with Cindy;" (3) "she told me that she and Cindy didn't get along;" (4) "Cheryl was telling me that Cindy had said that she thought they should wipe the slate clean and try to start anew and so forth and Cheryl said that she told her [Waters] that wasn't possible;" (5) "[Waters] didn't do much;" (6) "the general gist . . . was negative feelings between Cheryl and [Waters];" and (7) "[Davis] was going to ruin the hospital." (Supp. A. 84-85, 87-92).

Waters "was trying to find reasons to fire her" and had continued to blame Churchill for a patient complaint that was not Churchill's fault; and (3) "was saying what a bad place OB is to work." Ballew assured Waters "she would be willing to swear this was all true." (Supp. A. 53-54, 56-68).

Based on the reports they received from Ballew and Graham, Waters and Davis believed that Churchill was continuing her insubordinate and negative behavior—about which she had received written counseling only two weeks before. (Supp. A. 70-71, 218-19).[5] In Davis's view, the comments Churchill was accused of making were "against everything we were striving for to make it an attractive place to work, getting people to want to work down there, so this was a very negative thing to happen at that particular time." (Supp. A. 79). Waters saw the comments as yet another manifestation of Churchill's negative attitude and insubordinate behavior—"the straw that broke the camel's back." (Supp. A. 217-19). Davis and Waters decided that comments such as those Churchill was accused of making constituted an additional blatant act of insubordination and thus merited termination. (Supp. A. 70-71, 80-81).

Waters and Davis met with Churchill on January 27, 1987. According to Churchill, Waters and Davis informed her that they had decided to terminate her because of (1) her refusal to change her negative behavior despite

[5] During the final year of her employment, Churchill had repeatedly engaged in rude, insubordinate behavior toward Waters, her immediate supervisor. This behavior was observed not only by Waters, but also by other nurses in the OB Department. (Supp. A. 50-53, 95-98, 152-61). Churchill had been counseled on several occasions regarding her negative attitude toward the Hospital administration and Waters. (Supp. A. 174-85, 187-212).



being told several times that she must do so; and (2) "a conversation lasting 15-20 minutes with a cross-trainee who had been assigned to OB for a particular evening shift, [which] was reported as being non-supportive of the department and of its administrative leadership." (Supp. A. 37-39, 41-43).

Churchill filed a grievance with Defendant Stephen Hopper ("Hopper"), the Hospital's president, regarding her complaint that she had been "unjustifiably discharged" and "terminated . . . based on rumors and gossip." (Supp. A. 44). On February 6, 1987, Churchill met with Hopper and Bernice Magin ("Magin"), the Hospital's vice president of human resources, to discuss her grievance. According to Churchill, Hopper asked her to discuss (1) an earlier "first warning" regarding Churchill's insubordinate comments to Waters during a cesarean section; (2) "the comments [regarding insubordination] Cindy had written on my last evaluation;" and (3) "the incident regarding my talking about Cindy and Mrs. Davis, with negative overtones, one evening while working in OB with a cross-trainee working the same shift with me." (Supp. A. 40, 45-47). Instead of responding to Hopper's request that she discuss these topics, Churchill chose to voice her complaints about Hospital administration. She never indicated that these complaints also were the subject of the conversation with Graham.[6]

[6] The Seventh Circuit's conclusion that Hopper cut Churchill off when she attempted to describe her conversation with Graham is based on Churchill's repeated mischaracterization of the conversation in her briefs. For the reasons discussed below, what actually happened during the grievance meeting is irrelevant to the questions presented. However, because the Seventh Circuit's description of the investigation conducted here appears to have been so heavily influenced by its view of this meeting, defendants have included *Churchill's* account of the meeting in the Appendix. App. 75.

As part of his investigation of Churchill's grievance, Hopper reviewed Waters's and Davis's written reports of their conversations with Ballew and Graham. (Supp. A. 108). Hopper also had Magin interview Ballew one more time *after* the grievance meeting with Churchill. (Supp. A. 139-43, 147). Ballew once again confirmed the substance of her report to Waters regarding Churchill's negative comments about Waters and Davis. (*Id.*). After reviewing the information available to him,[7] Hopper decided not to overrule Davis's and Waters's decision to terminate Churchill's employment. His decision was based not only on Churchill's comments to Graham but also on her prior record of negative, insubordinate behavior. (Supp. A. 48, 100-07, 115-37, 144-46).

It is undisputed that Ballew's and Graham's reports were the precipitating factor in the decision by Waters and Davis to terminate Churchill, and in the decision of Hopper to approve the termination.

Based on these facts, defendants moved for summary judgment on the following grounds: (1) Churchill's statements to Graham (regardless of the version) did not constitute protected speech because Churchill was not raising issues of public concern because they were of public concern; (2) the Hospital's legitimate need to maintain discipline and harmony among co-workers outweighed Churchill's interest in making the comments she made to Graham; (3) the speech reported to defendants was unprotected as

[7] The Seventh Circuit suggested that defendants should have interviewed Jean Welty and Koch, both of whom allegedly witnessed part of the conversation between Churchill and Graham. There is no evidence that defendants ever were aware that either Welty or Koch was present during the conversation. This explains why they were not questioned.



a matter of law, and defendants were unaware of any protected speech at the time they made the decision to terminate Churchill; (4) the individual defendants were immune from liability because their actions were not clearly proscribed by the law in effect at the time of Churchill's termination, in light of the specific facts confronting them when they acted; and (5) the Hospital could not be held liable for any alleged constitutional violation because the individual defendants were not acting pursuant to any unconstitutional policy or custom of the Hospital.[8] The district court granted summary judgment on the first two grounds and did not reach the last three.[9]

The Seventh Circuit reversed, holding that "the district court inappropriately resolved material issues of fact against Churchill in holding that her speech was not a matter of public concern" and "was critical and disruptive of the hospital's interests." App. 9, 15-19. The court also went on to reach the issues not addressed by the district court. It held that defendants, including the individual defendants, could be held liable despite their lack of knowledge of Churchill's protected speech. The court stated:

> We hold that when a public employer fires an employee for engaging in speech, and that speech is *later* found to be protected under the First Amend-

[8] Churchill filed a cross-motion for summary judgment, contending that defendants' alleged failure to properly investigate the actual content of her speech violated her right to due process under the First Amendment. The district court denied this motion, a decision affirmed by the Seventh Circuit. App. 23 31.

[9] The district court also dismissed (pursuant to Rule 12(b)(6)) Churchill's claim that her termination violated her right of expressive association with Dr. Koch. App. 41-43. The Seventh Circuit affirmed this dismissal. App. 10 n.6.

> ment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* [emphasis in original] at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing *whether it was deliberate or accidental.*

App. 25 (emphasis added unless otherwise noted).

The Seventh Circuit also rejected the individual defendants' claim of qualified immunity. The court held that "in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern" and that "it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern." App. 27. It is not clear whether the Seventh Circuit actually reached the issue of the Hospital's liability.[10]

[10] The court expressed "serious reservations about whether the defendants can prevail on this defense," but did not specifically rule. App. 27-28 n.11. If this Court grants review and reverses the Seventh Circuit on the qualified immunity issue, this Court may reach the question of the Hospital's liability. Thus, if the Court grants review, defendants will address this issue.



## REASONS FOR GRANTING THE WRIT

### I.

### The Seventh Circuit's Holding That Public Officials May Be Held Liable for Mistakenly Believing Reports of Insubordinate Speech Raises Important and Unresolved Questions for All Public Employers.

Public workplaces are no less susceptible to the disharmony caused by insubordination than are their private counterparts. In *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court recognized the necessity of allowing public employers to eliminate such disharmony by punishing employees guilty of insubordinate speech. Indeed, even when an employee's speech arguably includes matters of public concern, a public employer is privileged to balance the employee's First Amendment rights against "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. A public employer need not "tolerate action which he *reasonably believe[s]* would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154 (emphasis added).

While acknowledging these basic constitutional principles, the Seventh Circuit nevertheless held that a public employer who terminates an employee based on reports of unprotected, insubordinate speech may be held liable for retaliatory discharge under the First Amendment if it is *later* shown that the reports were inaccurate and that the employee actually spoke on matters of public concern.[11] Although it expressly rejected Churchill's claim

[11] A substantial portion of the opinion below is devoted to the proposition that cross-training is an issue of public concern. Defen-

(Footnote continued on following page)

of a right to due process under the First Amendment (App. 23, 24 n.9),[12] the court below nevertheless held that an employer unaware of protected speech because of "an inadequate investigation"[13] may be held liable for retaliatory discharge "regardless of what the employer *knew* at the time of termination" and even if its lack of knowledge was "accidental." App. 25, 29.

In the Seventh Circuit's view, a public official risks substantial individual liability if he or she terminates an employee based on credible reports of insubordinate remarks, substantiated by two witnesses to the conversation in question, if other witnesses later come forward and convince a jury that the employer was misled at the time of termination. This extraordinary holding, which creates a standardless "duty to investigate" coupled with a negligence standard for liability, merits review by this Court.

[11] *continued*
dants never have contended otherwise. Once the Seventh Circuit made this point, it failed to discuss the equally well-settled proposition that comments such as those reported by Ballew and Graham do *not* address matters of public concern and are not protected by the First Amendment.

[12] In so doing, the court noted that in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court "did not establish any type of procedural protections and thus did not create a First Amendment due-process right." App. 24 n.9.

[13] The court did not discuss how much investigation an employer need do to meet this requirement, and it did not identify the constitutional source of this requirement.



## II.

**The Seventh Circuit's New Standard for First Amendment Retaliatory Discharge Actions (a) Conflicts Directly with This Court's Holding in *Mt. Healthy* and (b) Conflicts in Principle with Decisions of the Fourth, Fifth, Eighth, Tenth and Eleventh Circuits as to the State of Mind Required in First Amendment Retaliation Cases.**

It is undisputed that defendants *never* were informed that Churchill had discussed cross-training with Graham. Thus, defendants could not have been motivated by Churchill's allegedly protected speech when they made the decision to terminate her. In the Seventh Circuit's view, this undisputed fact is "immaterial" and defendants may be held liable if Churchill's speech is eventually found to have been protected "regardless of what [they] knew at the time of termination" and even if their alleged violation of Churchill's rights was "accidental." App. 25, 29. This holding conflicts with *Mt. Healthy*'s requirement that protected speech be a substantial motivating factor in the termination decision.

In *Mt. Healthy*, this Court "formulate[d] a test of causation" applicable to First Amendment retaliatory discharge cases. 429 U.S. at 283-87. In such cases, the plaintiff must "show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' in the [employer's] decision" to terminate her. 429 U.S. at 287. The Court relied on earlier decisions requiring proof of "discriminatory intent" in cases of unconstitutional discrimination based on race. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977) (citing *Washington v. Davis*, 426 U.S. 229 (1976)). Thus, the constitutional tort recognized in *Mt. Healthy* is an intentional one—the plaintiff must prove

"that the defendant's *intent* . . . to violate the plaintiffs' constitutional rights was a substantial motivating factor in the employment decision." *Tanner v. McCall*, 625 F.2d 1183, 1192 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981) (citing *Mt. Healthy*, 429 U.S. at 287; *Washington*, 426 U.S. 229) (emphasis added).

Churchill did not even attempt to convince the courts below that defendants actually knew about her allegedly protected speech. Nor did she contest the content of Ballew's reports to defendants, which disclosed only unprotected, insubordinate speech.[14] She claimed only that defendants had failed to conduct an adequate investigation. But defendants had several conversations with Ballew and Graham to confirm what Churchill said. Hopper also invited Churchill to give her side of the conversation. Even if, as the Seventh Circuit found, this investigation was somehow deficient, defendants' alleged negligence during the investigation is not a cognizable claim under *Mt. Healthy*. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986). *Mt. Healthy* requires that protected speech be a "motivating factor" in the discharge decision. Defendants could not be held liable merely for an "inadequate investigation."

The Seventh Circuit's analysis also conflicts with the second stage of *Mt. Healthy*'s causation analysis. Even

[14] This is not a case in which defendants had no basis for believing that Churchill engaged in insubordinate conduct. Viewed in the light most favorable to Churchill, the record merely showed that Churchill might *also* have addressed an issue of public concern in a portion of her conversation of which defendants never were aware. It is entirely speculative to assume, as the Seventh Circuit apparently did, that a more "thorough" investigation would have caused defendants to disbelieve Ballew and Graham.



when protected speech *is* a substantial motivating factor in a termination (a fact not present here), a public employer may still prevail if it shows "that it would have reached the same decision as to [the employee's termination] even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. In the district court, Churchill conceded that "speech on matters of purely personal interests or for the purpose of advancing personal grievances and the like is not protected. Furthermore, Plaintiff has no doubt that the reports submitted by Ballew and Graham to Waters and Davis could be construed in such a fashion." (Supp. A. 6). The uncontroverted record in this case established that defendants *did* construe the reports in such a fashion. By holding that defendants nevertheless can be held liable if their conclusions were wrong, the decision below conflicts with *Mt. Healthy* by imposing liability even when the employer has shown that it would have reached the same termination decision in the absence of protected conduct.

Although no circuit court of appeals has addressed the precise situation presented here, two circuits have refused to find a duty to investigate under the First Amendment, and three others have required proof of retaliatory intent.

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), the plaintiff (like Churchill) contended that the defendant decisionmaker relied too heavily on reports of insubordinate speech by a biased subordinate and failed to conduct an independent investigation before terminating the plaintiff based on those reports. *Id.* at 863. While noting that the defendant's "investigation into the circumstances surrounding [the plaintiff's] termination was not a model of thoroughness," the Tenth Circuit held that "these omissions and oversights amount[ed] at most to simple negligence, which cannot form the basis for a First

Amendment claim." *Id.* Even if, as alleged, the defendant was unaware of the plaintiff's protected speech as a result of the inadequate investigation, the "protected speech was not a substantial or motivating factor in [the defendant's] decision and . . . [the plaintiff] therefore failed to establish a First Amendment claim." *Id.* (relying on *Mt. Healthy*).

Similarly, in *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979), the plaintiff claimed that the defendant placed undue reliance on the representations of the plaintiff's supervisor when the defendant decided to terminate the plaintiff based on statements critical of her fellow employees. *Id.* at 1064. The plaintiff (like Churchill) contended that the defendant would have come to a different conclusion had he "taken it upon himself to make an independent investigation." *Id.* The Eighth Circuit refused to find any such duty of independent investigation. *Id.*[15]

In *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992), the plaintiff was disciplined for unprotected remarks which were reported in the local media. The plaintiff took the defendants to task for accepting a newspaper account of what he said and rejecting his version of the remarks. *Id.* at 1234. Since it was undisputed that the defendants believed the newspaper accounts, the Eleventh Circuit found irrelevant "what [the plaintiff] says he said [and] what he in fact said." *Id.*

In *Sims*, the court noted that the plaintiff did "not contend that the Defendants deprived him of procedural due process during their investigation of his conduct." *Id.* Here, Churchill did make such a claim. However, the district court found that Churchill had no Fourteenth Amend-

[15] In coming to its conclusion, the court was addressing the defendant's qualified immunity defense, a context discussed *infra*.



ment right to due process (a decision not appealed) and the Seventh Circuit refused to create a right to due process under the First Amendment. Thus, it is not entirely clear how the Seventh Circuit came to its conclusion that defendants could be held liable for an "inadequate investigation." App. 25.

The *Sims* court did address the standard for finding an investigation sufficient to establish a qualified immunity defense:

> The law does not require omniscience of the Defendants in their investigation of employee conduct; it requires only that their investigation be thorough enough to support a reasonable person's conclusion that action based thereon would not violate clearly established law.

*Sims*, 972 F.2d at 1234. Here, defendants' three interviews of Ballew, interview of Graham, and grievance meeting with Churchill supported a reasonable conclusion that Churchill engaged in unprotected, insubordinate speech sufficient to warrant her discharge.

The decision below that defendants could be held liable for "accidental" First Amendment violations also conflicts in principle with the holding in *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981). In *Tanner*, a political firing case, the Fifth Circuit held that "[p]rima facie proof of a constitutional violation must include evidence of impermissible motive. Although *Arlington Heights* and *Davis* were equal protection cases, the same burden of proof has been imposed in first amendment cases arising under the due process clause of the fourteenth amendment." *Id.* at 1193 (citations omitted). Similarly, in *Bell v. School Board of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984), another action alleging retaliation for First Amendment protected conduct, the Fourth

Circuit held that a plaintiff must prove "evil motive" to prevail. *Id.* at 157.[16]

Without citation to any authority other than *Mt. Healthy*, the Seventh Circuit has established a standardless duty to investigate before a public employer may terminate an employee for insubordinate speech and has extended liability to accidental failures to fulfill this newly created duty. Given the apparent conflict between this holding and *Mt. Healthy*'s causation requirement, and the confusion this decision is likely to create when compared to decisions in other circuits, this case merits review by this Court.

## III.

**The Seventh Circuit's Qualified Immunity Standard Appears to Conflict with the Holding of This Court in *Anderson* (and of All Circuits to Address the Issue) That Public Officials Can Be Held Liable Only for Violations of Constitutional Principles That Are (a) Clearly Established (b) in Light of the Information Possessed by the Officials When They Act.**

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court held that the immunity of public officials from individual liability for alleged constitutional violations must be determined based on the "objective legal reasonableness" of their actions, "assessed in light of the legal rules that were 'clearly established' at the time [those actions

[16] Before this case, the Seventh Circuit also required plaintiffs in First Amendment retaliatory discharge cases to prove that "the substantial or motivating factor was retaliation" and that the "exercise of first amendment rights [was] the 'cause' of the [adverse action suffered by the plaintiff]." *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 968 (1988).



were] taken." *Id.* at 639 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). Needless to say, the holding here, which appears to run contrary to *Mt. Healthy* and every case on point, cannot be said to state law that was "clearly established" six years earlier when defendants acted. To be sure, as the Seventh Circuit held, "the right . . . to speak out on matters of public concern was established long before 1987." App. 29. But in framing the issue as broadly as it did, the court below ignored this Court's instruction that the right to be protected cannot be identified at a "level of generality" which "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639.

Here, the issue properly framed was whether it was "clearly established" under *Mt. Healthy* that defendants could not act based on Ballew's and Graham's reports, which stood uncontradicted by Churchill despite Hopper's request that she discuss (in Churchill's words) "the incident regarding [Churchill] talking about [Waters] and Mrs. Davis, with negative overtones, one evening while working in OB with a cross-trainee working the same shift with me." App. 75. In holding that defendants did not do enough to find out what Churchill said, the court below cited no precedent other than *Mt. Healthy*, which the Seventh Circuit acknowledged *does not address any duty to investigate*. As this Court has held, the lack of any relevant precedent alone undercuts any assertion that the duty described by the Seventh Circuit was "clearly established." *Procunier v. Navarette*, 434 U.S. 555, 563-64 (1978). Here, defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Id.* at 565. The Seventh Circuit's holding is particularly troublesome in light of this Court's holding in *Connick v. Myers*, 461 U.S. 138 (1983), that

public employees *could* be discharged for insubordinate speech of the type reported to defendants.

The holding below also appears to conflict with the well-settled principle that a public official's actions must be evaluated based on the information possessed by the public official at the time he or she acted. *Anderson*, 483 U.S. at 641. Circuit courts following *Anderson* consistently have held that "even where the officials clearly should have been aware of the governing legal principles, they are nevertheless entitled to immunity if based on the information available to them they could have believed their conduct would be consistent with those principles." *Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989).[17] At the time of Churchill's discharge, there was nothing to put defendants on notice that Ballew's and Graham's reports might be inaccurate or that Churchill's speech might have focused on matters of public concern because they were of public concern. If, based on the information in the reports, a reasonable public official "*could have believed*" that Churchill's speech was unprotected under *Connick*, or that the hospital's interest in maintaining harmony among its employees outweighed any First Amendment right of Churchill

[17] *See also Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 667 (8th Cir. 1992); *Kreines v. United States*, 959 F.2d 834, 839 (9th Cir. 1992); *Hardin v. Hayes*, 957 F.2d 845, 848-49 (11th Cir. 1992); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1064 (11th Cir. 1992); *McBride v. Taylor*, 924 F.2d 386, 389 (1st Cir. 1991); *Creighton v. Anderson*, 922 F.2d 443, 447 (8th Cir. 1990). When, as in certain Fourth Amendment and due process cases, there is a duty to investigate, an official also may be charged with knowledge of information "reasonably discoverable" by the official. *Sevigny v. Dicksey*, 846 F.2d 953, 957 n.5 (4th Cir. 1988). As noted above, no court ever has established such a duty in a First Amendment retaliatory discharge case.



under *Pickering*, then the individual defendants were entitled to immunity even if they were "mistaken." *Anderson*, 483 U.S. at 641.

The Seventh Circuit's holding that defendants can be held liable "regardless of what [they] *knew*" [emphasis in original] and even if their lack of knowledge was "accidental" runs contrary to the basic premise of this Court's qualified immunity holdings:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

*Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). The court below, by focusing on what Churchill might have said, rather than on what defendants reasonably believed she did say, also ignored Justice Holmes's instruction that "the matter is to be judged on the facts as they appeared then, and not merely in the light of the event." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).[18]

[18] The Seventh Circuit even ignored its own holding in *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1242 (1992). In *Elliott*, the plaintiff was transferred after her employer received reports that her inability to get along with her supervisor undermined productivity in her department. 937 F.2d at 341, 343. The plaintiff claimed that the true motive for her transfer was her protected speech concerning a conflict of interest by the supervisor, but (like Churchill) she did not deny that the defendants had received reports of dissension in her department. *Id.* at 343. The Seventh Circuit held that the defendants were entitled to summary judgment on qualified immunity grounds because they acted on the basis of the reports. The court stated:

> [T]he question is not what the conditions in the [department] *were*; it is what the administrators reasonably believed them

(Footnote continued on following page)

The Seventh Circuit held defendants to a standardless duty to investigate never discussed, let alone clearly established, prior to this case. Then it concluded that the individual defendants "will be liable for damages for retaliatory discharge" if the jury believes Churchill, regardless of what defendants believed at the time of their decision. App. 29. This unprecedented, narrow view of qualified immunity will subject public officials to individual liability despite the "objective legal reasonableness" of their actions. It also will allow many more cases to proceed beyond the summary judgment stage and needlessly increase the litigation costs to be borne by public officials. This is the very result this Court's qualified immunity doctrine has sought to avoid. *See Anderson*, 483 U.S. at 640 n.2, 646 n.6. Accordingly, the Seventh Circuit's qualified immunity holding merits review by this Court.

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[18] *continued*

to have been. [Citations omitted]. *Objectively reasonable but mistaken conclusions do not violate the Constitution. If we assume that the staffers [who made the reports] were lying, this does not establish that the administrators' actions were unreasonable, given the information in their possession.* Conditions in the [department] are not relevant; *the inquiry must focus on what the defendants knew*, and whether reasonable persons in their position would have believed their actions proper given the state of the law in 1987.

*Id.* at 343-44 (emphasis added).



## CONCLUSION

For these various reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 91-2288

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

*Plaintiffs-Appellants,*

*v.*

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and MCDONOUGH DISTRICT HOSPITAL, an Illinois municipal corporation,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 87 C 1117—**Michael M. Mihm,** *Chief Judge.*

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ARGUED FEBRUARY 14, 1992—DECIDED OCTOBER 15, 1992

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Before CUDAHY, COFFEY, and MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* Cheryl R. Churchill appeals the district court's entry of summary judgment against her claim that the defendants fired her because she spoke out on a matter of public concern, namely the reduced quality of nursing care in the hospital's obstetrics department as a result of a recently instituted cross-training program. Because we hold that Churchill's speech is a matter of public concern when viewed in the light most favorable to the plaintiff Churchill (as we review the entry of summary judgment), we reverse.

## I. FACTS

McDonough District Hospital in Macomb, Illinois hired Cheryl Churchill as a part-time nurse in the obstetrics department on October 25, 1982. Churchill began working full time on September 16, 1985 and continued on full time status until her discharge on January 27, 1987. Churchill's performance evaluations received every six months during her employment demonstrated steady improvement through the December 1985 evaluation, and at this time the ratings improved to above standard performance or standard in every category. Churchill's June 1986 performance evaluation took a nose dive when Cynthia Waters, Churchill's supervisor, rated her performance as below standard in three of some fifty rating categories. But on the next six month's performance review in December 1986, Churchill once again received ratings of above standard or standard performance in every area.

Churchill's comments about her view of her job in the space provided on the evaluation forms for employee comments reflect her to be a cheerful employee who was enjoying her work through the December 1985 evaluation. Indeed, in the additional evaluator's comments on the December 1985 evaluation, Waters stated that "Cheryl has a very bubbly contagious sense of humor most times." But in spite of rating Churchill's performance as above standard or standard in every category on the December 1986 evaluation, Waters noted that Churchill "exhibits negative behavior towards me and my leadership through her actions and body language . . . ." Waters discharged Churchill less than two months after making these critical comments on an otherwise positive evaluation. Churchill alleges that the breakdown in relations between herself and Waters was the result of Waters' displeasure with her opposition to the hospital's improper implementation of a nurse cross-training program, which Churchill was convinced was detrimental to the welfare of patients in the obstetrical ward, as well as Waters' hostility toward her concerning her association with Dr. Koch, who like



Churchill had been subjected to Waters' animosity. In this review of a summary judgment against Churchill, we accept her version of events as true to the extent supported by the record or reasonable inferences therefrom.

In April of 1986 defendant Kathy Davis was hired as the hospital's vice president for nursing. Davis initiated a nurse staffing policy called "cross training," which involved transferring nurses to work in departments other than those in which they were trained and to which they were ordinarily assigned. Churchill objected to the cross-training program not as a matter of policy but on the ground that the cross-training was being implemented improperly, for rather than being assigned to a department for an organized training program on a regular schedule, nurses were assigned to other departments (e.g. nurse from orthopedics transferred to obstetrics) for "cross training" only when their respective departments were over staffed vis-à-vis the nurse-patient ratio in the particular discipline. Churchill felt that this cross-training procedure as implemented created a serious problem, for nurses would be inadequately trained and ill prepared to perform in the areas where they were only sporadically assigned. Furthermore, sending uneducated and untrained nurses into an unfamiliar discipline often distracted the regular nurses from their appointed tasks, thereby interfering with proper patient care and thus endangering patients. Churchill allegedly incurred the wrath of Waters and Davis through her vocal criticism of the type of cross-training program utilized.

Churchill asserts that she inadvertently aroused additional antagonism from the hospital administration through her association with Dr. Thomas Koch, the clinical head of the obstetrics ward, who was likewise outspoken in his opposition to the hospital's implementation of the cross-training program. According to Churchill, Dr. Koch initially incited the hospital administration's animosity in 1982 when he blamed inadequate nurse staffing in the

obstetrics department for the birth of a stillborn baby.[1] Prior to the incident of the stillborn baby, Koch had notified Waters that he believed the obstetric ward was understaffed, but it was not until after the near-fatal birth (resulting in brain damage to the infant) that the hospital agreed to provide additional staffing. Dr. Koch's battle with the hospital administration over nurse staffing policy continued through his opposition in 1986 to the cross-training program. By the summer of 1986, Churchill and Koch had become social friends (subsequently married in 1991), and the hospital administration perceived them as professional allies. Churchill's association with Koch allegedly offended the hospital administration, for she was able to provide him with information that he would otherwise not have had concerning the assignment of inexperienced nursing personnel to the staff in the obstetrics area. This in turn supplied him with ammunition for his campaign for improved and acceptable nursing care. By August of 1986, it became apparent that the hospital administrators were keeping files of criticisms rendered by Waters and Davis about Koch.

On August 21, 1986, a "code pink"[2] medical emergency occurred during a cesarean section procedure. When Churchill responded to the code pink, Dr. Koch instructed her to assist him with the emergency C-section.[3] Churchill

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[1] Although Dr. Koch was able to revive the baby, it still suffered mild mental retardation. The baby's parents brought suit against the hospital and Dr. Koch for the injury in an Illinois state court in 1984. The hospital settled out of court, and a jury acquitted Dr. Koch of any malpractice or other wrongdoing in the occurrence.

[2] A "code pink" in McDonough District Hospital means that the life of a baby or its mother (or both) is in immediate danger. When a code pink is called, all available doctors and nurses are required to report to the room where the emergency is occurring to render assistance.

[3] According to Dr. Koch's deposition, Churchill was the only nurse in the delivery room providing useful aid at the time.



assisted Dr. Koch until the C-section was completed and the baby was successfully delivered, at which time she excused herself in order that she might check on another patient who was in the early stages of labor. Upon determining that her other patient was not in need of immediate attention, Churchill returned to the delivery room and began documenting in the patient's record the various medical and surgical procedures used during the delivery. Shortly thereafter Waters, who entered the delivery room while Churchill was checking on her other patient, called Churchill from across the room and ordered her to check on her patient. Churchill in responding stated that she had just checked the patient and said: "you don't need to tell me what to do." Churchill thereupon returned to her patient as instructed even though she had not completed her patient record entries. Dr. Koch was furious with Waters for interfering with his operation and attempted to talk with her after completing the surgery, but she refused to discuss the matter with him alone. Waters called Stephen Hopper, the hospital's chief executive officer, and thereafter Waters, Koch and Hopper met to discuss the incident. The following day Hopper and Waters met with Davis and the administrative head of obstetrics to discuss Dr. Koch's complaints[4] and to decide how to deal with Churchill's response to Waters in the delivery room during the code pink procedure. They decided to issue Churchill a "written warning"[5] for insubordination because of her comment "[y]ou don't have to tell me how to do my job."

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[4] Hopper and Waters unsuccessfully attempted to block Dr. Koch's reappointment to staff privileges at the hospital for 1987.

[5] The hospital's Employee Handbook stated under "DISCIPLINE-GENERAL GUIDELINES" that "[t]he normal progressive discipline procedure consists of: 1. Verbal counseling[;] 2. First written warning[;] 3. Final written warning, which may include suspension[;] and 4. Discharge . . . exceptions or deviations from the normal procedure may occur whenever Administration deems appropriate."

The relationship between Churchill and Waters apparently continued to deteriorate throughout the fall of 1986, as Churchill's December 1986 evaluation included critical comments for the first time. In the evaluation Waters commented that Churchill's attitude toward her "promotes an unpleasant atmosphere and hinders constructive communication and cooperation." At the time of Churchill's discharge, the hospital administration decided to regard Waters' critical comments as a second "written warning."

The incident that directly led to Churchill's dismissal was her January 16, 1987 break-room conversation with a cross-trainee, Melanie Perkins-Graham, and Dr. Koch. According to Churchill's version of the occurrence, "practically the entire conversation related to cross-training and inadequate staffing, pulling of staff. The entire conversation almost, the majority of it consisted of speaking into [sic] terms of patient care and our concerns regarding that." In her deposition Churchill admitted that she said that if Davis' staffing policies were unchanged, Davis would ruin the hospital because "her administrative decisions seemed to be impeding nursing care." But she stated that when Perkins-Graham expressed reservations about transferring to obstetrics because of Waters' reputation throughout the hospital of being difficult to work with, she (Churchill) said that should not affect Perkins-Graham's decision because Waters was just doing her job. Churchill asserts that she encouraged Perkins-Graham to consider transferring to obstetrics full time and denied having engaged in personal criticism of Davis or Waters during that conversation. Mary Lou Ballew, another nurse who allegedly overheard only portions of the conversation, reported to Waters that Churchill took "the cross trainee into the kitchen for a period of at least 20 minutes to talk about you and how bad things are in OB in general." As a result of Ballew's report, Waters and Davis met with Perkins-Graham to discuss the conversation she had with Churchill. According to Davis' notes of the meeting, Perkins-Graham

> "stated that Cheryl had indeed said unkind and inappropriate negative things about Cindy Waters. She went on to say that Cheryl was not quiet about it and had assured her that I [Davis] had complete knowledge of everything she was saying because had said it to my face. She explained that Cheryl had discussed her evaluation quite a bit. She stated that C. Waters had wanted to wipe the slate clean and have things get better but this wasn't possible. She also stated that just in general things were not good in OB and hospital administration was responsible. Kathy Davis' name had also come up in the conversation and Cheryl had stated that Kathy was ruining [the hospital]. . . . By the end of the conversation [Perkins-Graham] was stating that she knew we could not tolerate that kind of negativism."



Waters and Davis did not question Churchill about the conversation, nor did they question Dr. Koch or another nurse who overheard the conversation, Jean Welty, both of whom have made it clear that they would have supported Churchill's version of the incident.

As soon as Davis heard about Churchill's conversation with Perkins-Graham, she decided to fire Churchill. But since she did not feel that she had the authority to terminate Churchill on her own, she bucked the decision up to Hopper. At a meeting on January 26, 1987, Waters, Davis, Hopper and the personnel director of the hospital, Bernice Magin, agreed to terminate Churchill's services. When Churchill arrived for work on January 27, 1987, Waters met her at the door of the obstetrics department and requested that Churchill accompany her to Davis' office. According to Churchill's notes from the meeting, Davis informed her in the presence of Waters that

> "it had recently been brought to her attention that I was continuing to exhibit negative behavior in the department, and that I had been reported by someone to have had a conversation lasting fifteen to twenty minutes with a cross trainee who had been assigned to OB for a particular evening shift. [Kathy Davis] declined to identify the date of the incident, or the

> name of the person with whom I was supposed to have talked even though I asked her. She replied by telling me that my conversation was reported as being non-supportive of the department and of its administrative leadership. Because of that, she said, 'We are going to have to terminate you.' "

Davis informed Churchill that the decision to terminate her was final, and that her only recourse was to talk with Hopper about it. Believing that Hopper, the Hospital C.E.O., would be fair and impartial and being unaware of the fact that he was involved in the decision to terminate her (including participating in the process of preparing the record to justify the termination), Churchill appealed the discharge to him. On February 6, 1987 Churchill met with Hopper and Magin in what turned out to be a star-chamber proceeding. In her handwritten notes of the meeting, Churchill stated that Hopper made clear that the discussion would be limited to a) the written warning she received, b) the negative comments on her December 1986 evaluation and c) the incident when she criticized Waters and Davis to an unidentified cross trainee in obstetrics one evening (Hopper did not inform her when the conversation took place). Hopper asked her specific questions about the written warning as well as the negative comments on her latest evaluation, but when she attempted to raise the issues she allegedly discussed with Perkins-Graham regarding the inadequacies of the cross-training program, Hopper "said he didn't want to get into that . . . ." In a letter dated February 12, 1987, Hopper informed Churchill that her termination was final:

> "In view of the seriousness of the latest reported incident and the fact that you previously received a written warning on August 25, 1986, as well as continued written counseling on your January 5, 1987 performance appraisal, I find that the decision to terminate your employment at McDonough District Hospital was appropriate."

Churchill filed her complaint in the federal district court in Peoria, Illinois pursuant to 42 U.S.C. § 1983 alleging



that in terminating her, the defendants violated her First Amendment right to free speech as well as her right to freedom of expressive association with Dr. Koch. After the preliminary skirmishes and the district court's partial grant of the defendant's first motion for summary judgment, *see Churchill v. Waters*, 731 F. Supp. 311 (C.D. Ill. 1990), Churchill moved for limited summary judgment on her free speech claim on the ground that the defendants violated her First Amendment due process rights in that they discharged her because of her speech regarding a matter of public concern (namely substandard implementation of cross training) without determining whether she was engaged in protected speech. The defendants moved to dismiss Churchill's freedom of expressive association claim for a failure to state a claim upon which relief could be granted, and for summary judgment on her free speech claims, on the ground that the speech was not protected speech, and even if it were, the defendants did not fire her for speaking out on a matter of public concern but for undermining the authority of the hospital administration. The district court a) dismissed Churchill's freedom of association claims for failure to state a claim upon which relief can be granted; b) entered summary judgment on behalf of the defendants on Churchill's free speech claim, holding that Churchill's statements were not protected speech as a matter of law, and even if they were, the hospital's interest in maintaining harmony among the workers and encouraging good working relationships among the employees and supervisors outweighed Churchill's interest in expressing her opposition to the cross-training policy to her co-worker; and c) denied Churchill's motion for partial summary judgment on her First Amendment due process claim without discussion.

## II. ISSUES

The issues on appeal are: 1) whether the district court inappropriately resolved material issues of fact against Churchill in holding that her speech was not a matter of public concern; 2) whether the defendants' failure to deter-

mine whether Churchill's conversation with Perkins-Graham was on a matter of public concern violated Churchill's First Amendment due process rights; and 3) whether the individual defendants are entitled to qualified immunity from Churchill's § 1983 claims.[6]

## III. MATTER OF PUBLIC CONCERN

The defendants admit that they fired Churchill because of her conversation with Perkins-Graham on January 16, 1987, but they contend that the district court was correct in holding that Churchill's conversation was not protected under the First Amendment. Churchill argues that the district court's holding that her speech was not protected was erroneous because the judge resolved genuine issues of material fact adversely to her in granting the defendants' motion for summary judgment. We agree. Public employees may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operations of the public [entity] in which they work." *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968). Furthermore, "a public employee [does not forfeit her] protection against governmental abridgement of freedom of speech if [s]he decides to express [her] views privately rather than publicly." *Greenberg v. Kmetko*, 840 F.2d 467, 472 (7th Cir. 1988) (quoting *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414, 99 S. Ct. 693, 696 (1979)). But in order for Churchill's speech to be protected, it must be capable of being "fairly characterized as constituting speech on a matter of public concern[; otherwise] it is unnecessary for us to scrutinize the reasons for her discharge." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983). While we review the entire record in order to determine whether Churchill's speech is a matter of public concern, *see id.* at 147-48, 103 S. Ct. at 1690, we may not resolve disputed issues of fact in order to come to a conclusion in our review of the district court's grant of summary judgment. *See* Fed. R. Civ. P. 57(c). The *status* of Churchill's speech is a question of law, *see Phares v. Gustafsson*, 856 F.2d 1003, 1007 (7th Cir. 1988), but in this case, where the *content* of the speech is in dispute, the substance of the speech is a question of fact for the jury to resolve. "In reviewing a grant of summary judgment, we must view the record and all inferences drawn therefrom in the light most favorable to the party opposing the motion. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962)." *Beard v. Whitley County, REMC*, 840 F.2d 405, 409-10 (7th Cir. 1988). After reviewing the record and considering all reasonable inferences therefrom in the light most favorable to Churchill, it is evident that the District Court's grant of summary judgment was in error, for according to Churchill's version of her statements, she was speaking out on improper nurse staffing policies at McDonough District Hospital that endangered the quality of patient care, an issue that is most certainly a matter of public concern.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S. Ct. at 1690. We have previously "recognized that content is the great-

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[6] Churchill also asserts that the district court's dismissal of her claim that her termination deprived her of her right to expressive association was in error because the defendants *perceived* her as being associated with Koch in opposition to the cross-training policy. Her failure to develop the argument (which the district judge rejected) that the defendants' perception of her association with Koch is adequate to establish an association "for the advancement of beliefs and ideas," *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1170 (1958), constitutes waiver. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) (undeveloped arguments are waived). Furthermore, we agree with the district judge that the right to expressive association "is not implicated when two persons simply hold common beliefs or even when those different person[s] express those common beliefs—they must join together 'for the purpose of' expressing those shared views." Mem. Op. at 14.

est single factor in the *Connick* inquiry." *Berg v. Hunter*, 854 F.2d 238, 243 (7th Cir. 1988). Churchill's deposition version of the January 16, 1987 conversation was that "practically the entire conversation related to cross training and inadequate staffing, pulling of staff. The entire conversation almost, the majority of it consisted of speaking into [sic] terms of patient care and our concerns regarding that." Churchill stated that it was her recollection that she said the cross-training program

> "wasn't fair to patients because when a nurse was in to take of a patient or anyone who goes in to take care of a patient, that patient assumes that that person who is delivering health care to them is knowledgeable and knows what they are doing. They expect them to be able to care for them in a routine fashion and also to be knowledgeable enough to administer care to them should an emergency develop."

Churchill recalled that during the conversation, she, Perkins-Graham and Koch agreed

> "that cross-training could be useful but only if it was implemented with properly structured teaching and a regular frequent exposure to the department. In other words, you could not use a specialty area or really any area of the hospital, I don't think, to just send nurses there so they wouldn't have to go home on a low census day so that they could make money rather than go home without making any money."

In discussing what she believed to be inadequate staffing, Churchill allegedly said that she believed patients were at risk because there were not enough nurses. Churchill further related that she discussed the hospital's violation of state regulations with Perkins-Graham:

> "I mentioned that there is a regulation and it's contrary to pulling people from OB to go to another area of the hospital to work and then come back because once you're assigned to the obstetrical department, you're to be assigned there for the entire evening. If you leave, you are not to come back. They, they



> being administration I suppose, I don't know where the policy came from, they got around that by saying that the person when returning from another area of the hospital would have to shower and change clothes, but that requires time, five, ten minutes, which if you have got a real emergency going, you don't have five or ten minutes for that."

In her complaint, Churchill alleged that during the conversation, she

> "charged that the Defendants WATERS and DAVIS ineffectively administered the nursing function of said Hospital, in particular the Obstetric Wing thereof, with respect to the duties, powers, and mission of the Hospital to discharge its responsibility to provide cost effective, high-quality health care services and products embracing all of the patients' needs, to improve patient care through 'state of the art' health care delivery systems, and to maintain an environment inspiring creative approaches by the medical and nursing staffs to complex health care challenges."

Accepting Churchill's version of the conversation as true (Dr. Koch as well as nurse Welty, who overheard the conversation, corroborated Churchill's version), she was undoubtedly speaking about a matter of public concern. There can be no doubt that when questioning the hospital's violation of state nursing regulations as well as the quality and level of nursing care it provides its patients, the nurse is speaking about matters of public concern. *See Frazier v. King*, 873 F.2d 820, 825 (5th Cir. 1989). Furthermore, accepting Churchill's description of the cross-training program as accurate, we are concerned whether the hospital's implementation of cross-training actually complies with the accreditation standards promulgated by the Joint Commission on Accreditation of Healthcare Organizations.[7] A

[7] The Joint Commission's accreditation rules are an authoritative source of which we may take judicial notice. *See Bethel Conservative Mennonite Church v. Commissioner of Internal Revenue*, 746 F.2d 388, 392 (7th Cir. 1984).

hospital that is well qualified for accreditation must assign clinical responsibilities in accordance with "the complexity and dynamics of the condition of each patient to whom the individual is to provide services and the complexity of the assessment required by each patient . . . ." *Accreditation Manual for Hospitals*, NC.2.1.2.2 (1992). In order to be competent to fulfill their assigned responsibilities,

> "[n]ursing staff members [should] participate in orientation, regularly scheduled staff meetings, and ongoing education designed to improve their competence.
>
> . . . .
>
> NC.2.3.3 If a nursing staff member is assigned to more than one type of nursing unit or patient, *the staff member [must be] competent to provide nursing care to patients in each unit* and/or to each type of patient.
>
> NC.2.3.3.1 *Adequate and timely orientation and cross-training [must be] provided as needed.*

NC.2.3 (emphasis added). The record seems to indicate that in the hospital's implementation of cross-training, it neither assured that each cross trainee was "competent to provide nursing care to patients in each unit" nor provided "[a]dequate and timely orientation." From our review of the record, the cross-training program provided very little, if any, education or training to prepare cross trainees for dealing with the complexities and dynamics of patient care in obstetrics. Churchill asserts that nurses untrained in the specialty of obstetrics were sent to OB on an unscheduled basis (in order to avoid sending them home when their departments were over staffed) to follow the regular obstetric nurses around. This is contrary to the assumption in the accreditation manual that in a well-managed hospital environment, "[n]ursing department/service assignments in the provision of nursing care are commensurate with the qualifications of nursing personnel and *are designed to meet the nursing care of patients*." NR.4 (emphasis added). As Churchill alleges, McDonough District Hospital's cross-training policy appears to have been



implemented merely to meet the bottom-dollar concerns of the hospital administration rather than the "nursing care of patients." We are not about to criticize a hospital administration for running a cost-efficient medical facility; however, we have serious reservations about the questionable practice of transferring nurses from one discipline to another without adequate education and training, thus possibly jeopardizing the health and welfare of its patients, and thereafter discharging an employee who properly points out the problems with the cross-training policy as implemented. In these days of highly technical medical procedures such as in vitro fertilization, obstetric and gynecological surgery (cancer), orthopedic surgery (hand, knee, leg), spinal surgery, cardiovascular surgery, ophthalmological surgery (detached retina) and heart, kidney, pancreas and liver transplants, nurses require specialized training before they are assigned to new areas. The failure to properly educate and train nurses in such highly specialized areas is most assuredly a matter of public concern.[8] Since Churchill's

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[8] A statement of another state's regulatory agency, namely the Wisconsin Board of Nursing, dealing with floating or transferring nurses from one discipline to another without proper training further buttresses our discussion and holding that Churchill's conversation in regard to the cross-training policy is a matter of public concern:

> "At times nurses are 'floated' to units needing staffing assistance or they are asked to provide nursing care in settings which are not their primary areas of employment. *Competence to perform safely in a particular area of nursing practice is based upon appropriate education, training or experience.*
>
> "[A] nurse may be found negligent and may be disciplined by the board for 'offering or performing services as a licensed practical nurse or registered nurse for which the licensee or registrant is not qualified by education, training or experience.' *A nurse is not necessarily qualified or competent to practice in any area of nursing simply because the nurse has graduated from a school of nursing and has passed the licensure exam.* Therefore, employers and nurses themselves are accountable for determining competence to practice in a particular area of

(Footnote continued on following page)

version of her conversation with Perkins-Graham (alleging that she was discussing this crucial matter of public concern) stands in stark contrast to the versions reported by Mary Lou Ballew and Perkins-Graham (who described the conversation as a "bitch session"), the content of the speech is a question of fact for the jury. The district court erred in taking it upon itself to resolve this disputed issue of material fact against Churchill.

The trial judge held that even if Churchill's conversations involved matters of public concern, the hospital was justified in discharging her because the hospital's legitimate interest as articulated in *Pickering v. Board of Education* outweighed Churchill's interest in expressing her opinion. We have summarized the balancing approach of *Pickering* as follows:

> "(1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence."



*Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973). The district judge held that in applying these factors

> "it is clear that the balancing favors the Defendants. Factors (1) and (4) deal with the need to foster healthy working relationships between an employee and her supervisors and co-workers. *In this Court's opinion the type of criticism which Churchill voiced to Perkins-Graham about her superiors was inherently disruptive to these interests and justified termination.* Thus, even if Churchill's remarks to Perkins-Graham were protected speech on matters of public concern, the Defendants would be entitled to summary judgment under the *Pickering* balance."

(emphasis added). This holding is erroneous because it is based on inferences from the record that are adverse to Churchill. In Jean Welty's deposition she describes the conversation between Churchill and Perkins-Graham as follows:

> "[Perkins-Graham said], 'Well, she only had one reservation and that was Cindy [Waters].' She had heard some negative things, very negative things about her all over the hospital and a lot of people didn't seem to like her. Cheryl [Churchill] spoke up and said, 'Oh, no, she has her moods but you just learn to pay, not pay attention to them and stay out of her way. And you will be fine when she gets moody. It's a big job,' she said, 'and sometimes it wears her down.'
>
> "Q Okay. Did you ever hear Cheryl Churchill make any comments derogatory of Cindy Waters?
>
> "A No.

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[8] *continued*

> specialty. . . . If an employer wants a nurse to rotate to an area that is not the nurse's usual area of assignment, then the employer should provide for the nurse's further education and training to prepare the nurse to work in the area.
>
> "Education, training or experience preparing the nurse to practice in situations outside the nurse's primary area of employment should be documented and kept on file by the nurse's employer."

Wisconsin Board of Nursing, *Wisconsin Regulatory Digest*, Vol. 1, No. 1, 2-3 (March 1988) (emphasis added). The Board has further stated:

> "When nurses are confronted with situations wherein they are asked to provide services for which they do not feel competent, they have a responsibility to decline to do so. . . ."
>
> "The board prohibits nurses who are not competent in methods of practice from performing nursing care. Protection of the public health and safety is the primary charge of the board, and it sees this charge as essential in the provision of all nursing care."

*Id.*, Vol. 3, No. 1 at 2 (March 1990).

"Q At any time during the remainder of that shift did you hear Cheryl Churchill make any comments derogatory of Cindy Waters?

"A No."

In view of this testimony as well as Churchill's testimony that she told Perkins-Graham that she "didn't have any problem" with Waters and that she and Waters did and could "continue to have a good working relationship, professional working relationship," we believe the district judge erroneously resolved a genuine issue of material fact regarding whether Churchill's speech was critical and disruptive of the hospital's interests in a manner adverse to Churchill.

The district judge resolved a second issue of fact adversely to Churchill when he found that her "objective was not to inform but rather to gripe."

> "[T]he *Connick* test does not consist in looking at what might incidently be conveyed by the fact that an employee spoke in a certain way. The test requires us to look at the *point* of the speech in question: Was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"

*Zaky v. United States Veterans Admin.*, 793 F.2d 832, 838 (7th Cir. 1986) (citation omitted) (emphasis in original). Churchill argues that the point of her speech was to bring the violation of state nursing regulations to light and to discuss the risks to patients because of the inadequacy of the hospital's cross-training policy, while the hospital asserts that the tenor of the conversation was to express antagonism to the administration. The determination of such an issue is best resolved through giving the judge or jury the opportunity to observe the verbal and nonverbal behavior of the witnesses focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture



and body movements, rather than looking at the cold pages of depositions, which is all the court had before it on the summary judgment motion. A witness's behavior during the trial can very well reveal deception or untruthfulness through evasiveness on the witness stand that is more frequently than not undiscernible in the pages of a deposition. It was inappropriate for the district court to make credibility judgments of this nature when deciding the motion for summary judgment.

The district court not only made improper credibility determinations in holding that the *Pickering* tests favored summary judgment for the defendants, it also ignored Churchill's interest in fulfilling her ethical duty as a nurse to speak out on what she believes to be a matter of public concern that is related to the safety and proper care of the patients entrusted to her care.

> "The nurses's primary commitment is to the health, welfare, and safety of the client. As an advocate for the client, *the nurse must be alert to and take the appropriate action regarding any instances of incompetent, unethical, or illegal practice by any member of the health care team or the health care system, or any action on the part of others that places the rights or best interests of the client in jeopardy. . . .*"
>
> "When the nurse is aware of inappropriate or questionable practice in the provision of health care, concern should be expressed to the person carrying out the questionable practice and attention called to the possible detrimental effect upon the client's welfare."

American Nurse's Association, Code For Nurses with Interpretive Statements §§ 3.1-3.2 (1985) (emphasis added). Construing the record in the light most favorable to Churchill, we believe she was acting in strict accordance with the Code For Nurses. She identified and was trying to do something about the problems that had the potential of having detrimental effects on her patients—charging untrained nurses with patient care in obstetrics, understaffing the hospital and interfering with the duties of com-

petent nurses in obstetrics as the result of assigning cross trainees with a lack of education and skill to them. She also argued that the hospital was possibly in violation of state regulations when transferring nurses into and out of the obstetrics department during the same shift. 77 Illinois Administrative Code, Chapter I § 250.1530, Subchapter b, § f(1)(E). We wish to make it very clear that we do not condone an insubordinate or troublemaking employee, but Cheryl Churchill's actions fall far short of the actions of an insubordinate or problem employee. From our reading of the record, her concern was also that patient health care was endangered due to the controversial cross-training policy that transferred a nurse trained in obstetrics to another department (pediatrics, orthopedics) where that nurse was inadequately trained to give appropriate health care and then recalling her back to the obstetrics department during the same shift. *See id.*; (TR. Vol. II at 302-309, 317). In taking action to report this controversial practice, Churchill lived up to the highest ethics of her most noble profession. American Nurse's Association, Code For Nurses with Interpretive Statements §§ 3.1-3.2 (1985). Churchill took appropriate action in that she discussed her perception of the problems with Waters, her supervisor, and continued to lobby for change when nothing was done to remedy the situation. She also warned Perkins-Graham of the danger of her, as a cross trainee, supplying inadequate patient care. Churchill's interest in fulfilling her duties and obligations as an ethical, responsible professional, when viewed in this light, clearly outweighs the hospital's interests in interfering and ultimately preventing her from speaking out on important matters of public concern. Thus, we are of the opinion that the district court should have denied the defendant's motion for summary judgment.

We note that if the district court had considered the record in the light most favorable to Churchill, it would have concluded that the "history of hostility between Churchill and her supervisors" to which it referred was nothing but a one sided demonstration of hostility toward Churchill.



Up until the summer of 1986, when Churchill began opposing the newly instituted training program and she and Dr. Koch began developing their friendship, the relationship between Churchill and her supervisors was positive and congenial. On the December 1985 performance evaluation, Waters found Churchill's sense of humor to be noteworthy, and on three of her four evaluations through December 1985, Churchill's own responses in the section for employee comments included "smiley" faces, thereby revealing her cheerful attitude about her job. The first criticism in Churchill's file came in June of 1986 when Waters described her relationship with Dr. Koch as being unprofessional. It is certainly suspect that Waters' performance evaluations of Churchill plummeted (from positive to negative) almost contemporaneous with the time that Waters gained knowledge of Churchill's personal relationship with Dr. Koch, a physician who in the past had vigorously complained about how the inadequate nurse staffing had contributed to the birth of a brain damaged infant. Waters' disapproval of Churchill's personal relationship with Dr. Koch reveals that Waters considered Koch and Churchill to be "professional allies" jointly opposed to the hospital's cross-training policy. As an example of Waters' attitude towards her during this period of heightened analysis of the cross-training policy, on August 21, 1986, Waters ordered Churchill out of the delivery room to perform a routine check on another patient while Churchill was assisting Dr. Koch in an emergency (code pink) cesarean section procedure. It is well established that the control of the operating room is in the hands of the surgeon in charge. The surgeon is the "Captain of the Ship" in the operating room and in most instances is liable for the negligence of any personnel assisting in the operation. *See Berg v. United States*, 806 F.2d 978, 983 (10th Cir. 1986). Thus, the doctor performing an emergency C-Section has a legitimate expectation of being able to control and direct the nurses and the entire medical staff assisting in the operating room and to be able to count on them to effectively and professionally carry out their respective tasks.

Dr. Koch stated that Nursing Supervisor Waters "shouldn't have been in [the operating room]. Her presence was not needed and she should not have been there." He was "very angry because she was disturbing my operating room." As Dr. Koch argued to Waters and Harper in his meeting with them subsequent to the incident, he was the person in command and responsible for the operation as well as the personnel assisting, and it was his duty and responsibility alone to see that the nurses were carrying out their duties; Waters had no business whatsoever in interfering and disrupting the tense, highly-charged atmosphere in the C-Section code pink delivery room scenario where every movement and moment counts vis-à-vis the life of the baby and mother. Under the circumstances, a jury could very reasonably infer that Waters' conduct in ordering Churchill to leave the delivery room was the result of her personal animosity toward Churchill.

The record reveals that Waters' criticism of Churchill was primarily because she (Churchill) spoke against the cross-training policy out of her public concern that patient health may be jeopardized. In light of this record, Churchill's purpose and/or motive in making statements to Perkins-Graham about the problems the cross-training policy created in the obstetrics department and her comments about Cynthia Waters' involvement in the cross-training policy certainly present material issues of fact regarding the content of Churchill's speech. As we have established, the district judge obviously made a number of credibility judgments resulting in the resolution of factual issues adverse to Churchill. Since all reasonable inferences must be drawn in favor of the non-moving party on a summary judgment motion, the district court erred.

## IV. FIRST AMENDMENT DUE PROCESS

The defendants argue that they have a complete defense to Churchill's claims because, as Churchill alleges, they were unaware of the actual content of her January 16, 1987 conversation with Perkins-Graham. Under *Mt. Healthy City*



*School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977), a plaintiff is obligated "to show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' " in the termination decision. Thus, the defendants contend, even if the discussion involved protected speech, Churchill has failed to demonstrate that the fact that she was discussing matters of public concern was a motivating cause of her termination. In order to get around this *Mt. Healthy* defense, the plaintiff argues that the hospital's failure to properly investigate the actual content of her speech violated her right to due process under the First Amendment. Notwithstanding the lack of a Due Process Clause in the First Amendment and the lack of case law holding that an at-will public employee has a right to a hearing before he or she may be discharged for engaging in protected speech, Churchill asserts that we must create such a right in order to protect the free-speech rights of public employees. She insists that otherwise employers may avoid liability for violating employees' free-speech rights through deliberate ignorance of the content of the speech, thereby creating a chilling effect on speech that opposes official policy. We disagree that it is necessary to create a First Amendment due process right in order to protect the rights of public employees to speak out on matters of public concern, for we believe that *Mt. Healthy* provides adequate safeguards regardless of whether the employer actually *knew* the precise content of the statements for which it fired the employee.

In *Mt. Healthy*, the Supreme Court considered the claims of a non-tenured teacher whom the school board decided not to rehire (and thus not grant him tenure). The Court ruled that this violated his free-speech rights because the decision was partially based on a conversation the teacher had with a local radio station announcer. The Court held:

> "Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been

> discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms."

*Id.* at 283, 97 S. Ct. at 574 (citations omitted).[9] The Court further held that the plaintiff must establish that he would not have been dismissed absent the constitutionally protected conduct:

> "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."

*Id.* at 285-86, 97 S. Ct. at 575. Thus, when an employee claims to have been terminated for engaging in protected speech, the public employer must establish "by a preponderance of the evidence that it would have reached the same decision as to [the employee's termination] even in the absence of the protected conduct." *Id.* at 287, 97 S. Ct. at 576. The defendants allege they have carried that burden, for they allege that they fired Churchill for complaining in general rather than for engaging in conversation about the cross-training policy. But the point of *Mt. Healthy* is the "protected *conduct*," rather than the public

[9] We note that while the Court held the claims to be actionable, it did not establish any type of procedural protections and thus did not create a First Amendment due-process right.



employer's knowledge of the precise content of the speech. The hospital admits it discharged Churchill for her conduct in speaking with a fellow employee during a break because they viewed the speech as critical and disruptive. If on remand the jury determines that the point of Churchill's conversation was to raise the issues of inadequate nurse staffing resulting in inept patient care and even danger to patients because of the allegedly ill-conceived and inept cross-training policy rather than simply to complain, then she was engaged in protected conduct. We hold that when a public employer fires an employee for engaging in speech, and that speech is later found to be protected under the First Amendment, the employer is liable for violating the employee's free-speech rights regardless of what the employer *knew* at the time of termination. If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental.[10]

## V. IMMUNITY

The individual defendants argue that they are entitled to qualified immunity from Churchill's claims because there was no clearly established law at the time of her discharge (or now) holding that it would be unconstitutional to fire her for the conduct that was reported to them.

[10] We note that the defendants misrepresent the record when they claim that they gave Churchill the same due process that she would have been entitled to receive if she possessed a property right in her employment. Although Davis and Waters met with Churchill prior to termination, and Hopper and Magin met with her later, no one informed her that she was being discharged for her January 16, 1987 conversation with Perkins-Graham. Furthermore, there is no evidence in the record that Churchill's supervisors followed the hospital's general guidelines for discipline (*see supra* n. 5) and gave her an oral warning prior to her first written warning or counseling thereafter.

> "[G]overnment officials performing discretionary functions are shielded from liability for civil damages unless their conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The principle behind the doctrine is that '[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.' *Id.*"

*Greenberg v. Kmetko*, 840 F.2d 467, 472 (7th Cir. 1988). The employee must allege that the public employer violated a specific right rather than a generalized or abstract one:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent."

*Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

The individual defendants rely upon our statement in *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988), that "the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." *Id.* (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987). They assert that at the time of termination, the fact confronting them was that Churchill "had made negative and inappropriate comments about Waters and Davis" that they believed was interfering with working relationships in the hospital. Thus, as in their *Mt. Healthy* defense, the individual defendants would have us focus on what they knew (or did not know because they failed to conduct a thorough



and impartial investigation) about the content of the conversation rather than the fact that they admittedly fired Churchill for her speech. In our opinion, the defendants' argument is misdirected, for the "specific fact[ ] confronting the public official[s]" was that Churchill was accused of engaging in speech that was critical of the administration of the hospital, and in 1987 the law was clear that the speech of public employees while at work was protected under the First Amendment if it was about matters of public concern in connection with their workplace. *See Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734; *see also Egger v. Phillips*, 710 F.2d 292, 314 n.26 (7th Cir. 1983). Thus, "a reasonable official [sh]ould [have] underst[ood] that what he [was] doing violate[d]" the employee's free speech rights if he fired her for speaking out on a matter of public concern. *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039. We believe it is immaterial that the defendants were allegedly unaware of whether Churchill's speech was in regard to a matter of public concern—for while we decline to impose a due process requirement that public officials investigate the precise content of an employee's alleged complaint, we hold that ignorance of the nature of the employee's speech (in particular in light of the record before us) is inadequate to insulate officials from a § 1983 action.[11]

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[11] The defendants also argue that the hospital is not amenable to suit under § 1983 because it does not have the official policy Churchill alleges, i.e., "that employees could discuss only with supervision matters pertaining to the employees' or the hospital's welfare." The district court did not address this issue, and we are unable to determine the actual hospital policy, for while the personnel policy cited does not explicitly require employees to discuss hospital problems with supervision alone, there is deposition testimony from personnel manager Bernice Magin as well as from the defendant Hopper suggesting that such a policy exists. Regardless of the specific policy, we have serious reservations about whether the defendants can prevail on this defense, for Hopper, the hospital administrator, has the responsibility of "[s]electing, employing, controlling, and discharging employees and developing and maintaining

(Footnote continued on following page)

## VI. CONCLUSION

It is most disheartening to witness this scenario of combat and distrust occurring in far too many hospitals today across our country and is achieving nothing, but to exacerbate the nation's health care problems for hospital administrators are all too often turning a deaf ear to the needs and recommendations of the medical and nursing staffs. It is nothing but a turf battle between the administrators and their respective governing boards versus the health care professionals. This conflict does nothing for, and in fact interferes with and stifles, the health professional's interest and dedication in rendering the optimum of well-accepted patient care within the proper cost guidelines and at the same time without emasculating the employees' rights to express their constitutionally protected views on matters of public concern. This very delicate balance between the administrators, the hospital's board and the health care professionals must be maintained and fostered by all parties for the good of the patients in their care.

We hold that the district court erred in granting summary judgment on behalf of the defendants, for there are genuine issues of material fact in dispute regarding the content of Churchill's speech. If the jury finds that Churchill's

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[11] *continued*
personnel policies and practices for the Hospital." McDonough District Hospital By-Laws, Article IX, § 2, ¶ (D). As Hopper was involved in the decision to fire Churchill (and was the supposed independent reviewer of the decision), the termination may be considered to have been carried out pursuant to hospital policy. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924 (1988) ("officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability.") (plurality opinion). Incidentally, since the individual defendants are not immune and Illinois indemnifies public employees for judgments against them for their actions within the scope of their employment, *see* Ill. Rev. Stat. ch. 85 ¶ 9-102, it makes little difference in this case whether the hospital itself is subject to suit.



version of the January 16, 1987 conversation is true, the defendants will be liable for damages for retaliatory discharge unless they can establish that their interest in controlling the workplace under the *Pickering* test outweighs Churchill's interest in speaking out on matters of patient safety. We further hold that it is immaterial whether the defendants knew (or deliberately ignored) the precise content of Churchill's conversation, for they knew or should have known from the state of the law as of that date that they were terminating her for engaging in speech that may have been protected under the First Amendment; and that the right of public employees to speak out on matters of public concern was established long before 1987. The judgment of the district court dismissing Churchill's free-speech claims is REVERSED AND REMANDED pursuant to Circuit Rule 36 for further proceedings consistent with this opinion.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois

December 9, 1992

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

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CHERYL R. CHURCHILL and
THOMAS KOCH, M.D.,

Plaintiffs-Appellants,

No. 91-2288 v.

CYNTHIA WATERS, KATHLEEN DAVIS,
STEPHEN HOPPER, et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Central District of Illinois
No. 87 C 1117—Michael M. Mihm, Judge

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ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.



[DATED MAY 17, 1991]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

| | | |
|---|---|---|
| CHERYL R. CHURCHILL and THOMAS KOCH, M.D., | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 87-1117 |
| CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation, | ) | |
| Defendants. | ) | |

ORDER

Before the Court are the Defendants' Motion to Dismiss and Motion for Summary Judgment as well as the Plaintiff's Motion for Summary Judgment. For the reasons set forth, the Defendants' Motions are granted and the Plaintiff's Motion is denied.

FACTUAL BACKGROUND

The pertinent facts of this case were previously outlined in this Court's order of February 16, 1990. For convenience, that section is reprinted here.

Cheryl Churchill was hired as a part-time nurse in Obstetrics by McDonough District Hospital ("MDH") on October 25, 1982. On September 16, 1985 she began work as a full-time nurse in Obstetrics. On January 27, 1987 she was discharged by the hospital.

In April of 1986 Defendant Kathy Davis was hired by MDH as Vice-President of Nursing. Soon after her appointment, Davis made a number of changes in nursing practices, including the implementation of what is known as "cross-training." Cross-training involved pulling full-time nurses from general medical areas of the hospital and training them in more specialized nursing areas, such as obstetrics, so that the cross-trainees could provide flexible staffing as needed. The institution of this new policy was rather controversial, triggering a certain amount of controversy and discussion among medical and nursing staff at the hospital.

Among those opposing cross-training was Churchill, while the individual Defendants all supported it. According to Churchill, she participated in a number of conversations about cross-training with other staff of the hospital.

On August 21, 1986 a medical emergency ("code pink") developed in the Obstetrics Department. The doctor on duty was Thomas Koch, M.D., the clinical head of the Obstetrics Department. A probationary employee, Mary Lou Ballew, was ordered by Dr. Koch to sound the alert for the "code pink." She did not know what to do and failed to alert all the necessary medical personnel. Koch directed Churchill to prepare the delivery room for the impending emergency Caesarean Section and then himself secured the "code pink" alert.

During the surgical procedure, Defendant Cynthia Waters arrived in the delivery room. She asked Churchill about one of Churchill's patients who had recently delivered and was in the recovery room. Churchill checked on the patient and returned to the delivery room. Once again, Waters asked her about her patient. In response, Churchill said, "You don't have to tell me how to do my job." At that



point, Dr. Koch reprimanded Waters, informing her that she was out of line in interfering with his orders to Churchill. Nonetheless, Churchill left the delivery room. After the operation, Dr. Koch again approached Waters to discuss her conduct. Waters, however, would not discuss the matter with Koch. Instead, she contacted Defendant Stephen Hopper, the President and CEO of MDH.

Subsequently, Hopper held a conversation with Koch and Waters, as well as another nurse, Marsha Clausen. Dr. Koch not only complained about Water's behavior, but expanded the conversation to include general complaints about the new nursing policies implemented by Davis and Waters.

Kathy Davis, who had been unavailable for that meeting, was contacted by Hopper and Waters later. Hopper, Davis, and Waters met on August 22 and August 25, 1986, and decided to issue a written warning to Churchill for insubordination based on her response to Waters in the delivery room. The written warning was presented to Churchill on a special form on August 25. The warning read as follows:

> REASON FOR WARNING: (1) Insubordination—when had to be asked twice to leave the delivery room, you responded to me [Waters] in a very hostile manner, "I don't need you to tell me how to do my work." (2) General negative attitude and lack of support toward nursing administration in the OB Department.
>
> WARNING GIVEN: Insubordination and/or lack of cooperation will not be tolerated in the future as it is very detrimental to the operations of the OB Department. Any future occurrence of this behavior will be subject to further disciplinary action which may include assignment to another nursing area or discharge.

In Churchill's deposition she acknowledged that, although she could have submitted a written response, she chose not to do so saying that she did not wish "to make mountains out of molehills." She also did not file a grievance protesting this warning.

On January 5, 1987 Churchill received her annual evaluation from Waters. The evaluation showed standard or strong performances in every area of the evaluation and reflected no areas of weakness. At the end of the evaluation, Waters wrote:

> Cheryl exhibits negative behavior towards me and my leadership—through her actions and body language, i.e. no answer, one word abrupt answers followed by turning and leaving, blank facial expressions, or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation.

In the conversation between Churchill and Waters which accompanied the evaluation, Waters did not mention the handwritten comments at the end of the evaluation, and Churchill made no response either orally or in writing nor did she file a grievance.

On January 16, 1987 Cheryl Churchill began work on the 3:00 to 11:00 p.m. shift. The nurse in charge was Jean Welty. Other nurses working the same shift included Mary Lou Ballew and Melanie Perkins-Graham. Following departmental custom, Churchill and Perkins-Graham were eating their dinner in a kitchen area situated behind the main nurse's station in Obstetrics. Ballew and Welty were at the main desk. Dr. Koch walked into the department and went into the kitchen area where Churchill and Perkins-Graham were eating. Welty remained at the front desk while Ballew (the nurse present in the delivery room during the previously discussed incident involving Churchill,



Koch and Waters) heard parts of the subsequent conversation in the kitchen; however, she was not at the desk or in the kitchen area for the entire course of the conversations since she was answering patient lights and performing other nursing duties.

Perkins-Graham told Koch that she was in the department for cross-training and was thinking about transferring to Obstetrics permanently. The subsequent conversation involved general criticisms and comments about the cross-training policy. Welty overheard Koch express his general views about cross-training and his reasons for disliking that policy. She also heard Churchill agree with Koch and say that Kathy Davis's policy was going to "ruin the hospital," and that some aspects of the cross-training program might violate certain state regulations. Welty also heard Perkins-Graham contribute her views to the conversation, and indicate that, while she was interested in transferring to the OB Department, she was reluctant because she had heard so many bad things about Cindy Waters. Welty heard Churchill encourage her to transfer, saying that Cindy Waters had a hard job but good intentions and that she was sometimes moody.

Ballew overheard only segments of this conversation. Apparently, she construed those portions she heard as negative and intended to dampen the enthusiasm of the cross-trainee, Perkins-Graham. Because of this, Ballew reported the conversation to Waters, who went to Hopper on January 21 and advised him of the conversation. Hopper, who wanted to include Kathy Davis, held a meeting the next day at which Davis, Waters, and Hopper decided to talk to Perkins-Graham. On January 23, Perkins-Graham was summoned to Davis's office. When she arrived, accompanied by her supervisor, she agreed that Churchill had said unkind and inappropriate negative things about

Cindy Waters and had said that things in general were not good in OB as a result of hospital administration policies. She repeated Churchill's comment about Kathy Davis "ruining the hospital" but admitted that she could not remember the conversation very specifically.

On January 26, 1987, Waters, Davis, Hopper, and Bernice Magin (Personnel Director of MDH) held a meeting at which they decided to discharge Churchill. The next day when Churchill arrived at work, Waters summoned her to Davis's office. There, Churchill was advised by Waters that, because she had continued to undermine the department and the hospital administration, Waters had no choice but to fire her. Bernice Magin explained how Churchill's benefit package would work following her discharge, discussed her final paycheck, and later explained to her the grievance procedure at the hospital.

Pursuant to the hospital's grievance procedure, Hopper reviewed the grievance Churchill filed. Churchill did not know and was not told of Hopper's involvement in the decision to fire her. Hopper decided that there had been three warnings beginning with the written warning following the delivery room incident. The second warning, he concluded, was the written criticism at the end of Churchill's evaluation. He concluded that Churchill's conversation on January 16 was a third offense within 12 months and therefore upheld the discharge.

At his deposition, Hopper testified that he found Churchill's comments about Davis and Waters objectionable not only because of their negative, insubordinate content, but also because she was voicing her concerns during working hours to the wrong forum. He viewed Churchill's conflict with Waters as a personal dispute which interfered both with department operations and with the hospital's cross-training policy.



## PROCEDURAL HISTORY

Churchill initially filed a four-count complaint against the Defendants. Counts I and III charged that the individual Defendants and MDH violated her First Amendment rights by firing her in retaliation for the comments she had made about hospital staff and policies. Count II charged that the individual Defendants' conduct also violated her Fourteenth Amendment rights to due process. Count IV alleged a common law breach of contract against MDH. After this Complaint had been amended once, the Defendants filed a joint Motion for Summary Judgment. By its order of February 16, 1990, this Court granted the Defendants' Motion as to Counts II and IV, but denied it with respect to the First Amendment charges of Counts I and III, finding that disputed issues of material fact still existed with respect to those claims.

After reconsideration motions were heard and denied and as the case was proceeding through a continued final pre-trial conference on September 5, 1990, Churchill moved to file a Second Amended Complaint. This new Complaint sought to add Dr. Thomas Koch as a party Plaintiff and to add a new Count V to the existing Complaint. Over the Defendants' objection, this Court granted leave to file the Second Amended Complaint on September 17, 1990. Count V added essentially three new components to the Complaint. First it alleged that the Defendants had violated Koch's First Amendment rights by delaying the renewal of his hospital staff privileges in the fall of 1986. Secondly, it alleged that the Defendants were taking measures to amend the hospital's medical staff by-laws to facilitate efforts to restrict Koch's staff privileges. Finally, Count V also alleged that the Defendants, by taking such adverse actions against Churchill and Koch, had violated

their First Amendment right to freedom of expressive association.

Shortly after this Second Amended Complaint was filed, the Defendants filed a counterclaim against Koch for indemnity. The counterclaim alleged that any and all emotional injuries suffered by Churchill were due to Koch's deficient and improper treatment of Churchill's psychological problems. The Defendants then filed the pending motions for dismissal of Count V and for summary judgment as to Counts I and III. Churchill then filed her pending Cross-Motion for Summary Judgment as to Count I. While these Motions were being briefed by the parties, the Plaintiffs filed a Third Amended Complaint, admittedly intended to cure possible defects in Count V. The issues presented are, to say the very least, fully briefed and ready for disposition.[1]

## DISCUSSION

### I. *Motion to Dismiss Count V*

The Defendants move to dismiss Count V on the grounds that all of Koch's allegations of free speech deprivation lack the constitutional prerequisite of "case or controversy" and that Churchill's and Koch's combined claim for violation of First Amendment right to freedom of expressive association fails to state a proper claim for relief. The Defendants argue that, once these allegations are dismissed from Count V, all that remains are claims of free speech violations against Churchill which are duplicative of Counts I and III. This Court agrees in all respects.

[1] It should be noted that many trees were sacrificed to fuel the legal battle in this lawsuit. Reams upon reams of paper are contained in the file jackets of this case, which currently occupies one full file drawer (27" deep) in the Clerk's Office. In addition to lengthy initial briefs and responses on their respective motions, the parties here have filed replies, sur-replies, and responses to those sur-replies. Motions for leave to file supplemental authority have arrived on the courthouse steps with regularity, as well as occasional statements of clarification.



#### A. *Case or Controversy*

At the time the Defendants' Motion to Dismiss was filed on October 9, 1990, the Plaintiff's Second Amended Complaint was operative. In Count V of that Complaint, Koch alleged that the Defendants *attempted* to deny him a renewal of his hospital staff privileges in 1986 in retaliation for Koch exercising his First Amendment right to free speech. Although his staff privileges were actually renewed, Koch alleged that he had become, in the process, inhibited from expressing his views and therefore sought injunctive relief against the Defendants, prohibiting them from punishing him for the exercise of his First Amendment rights in the future. The Defendants' Motion to Dismiss argued that these allegations contained no case or controversy as required by Article III of the Constitution because Koch's privileges had actually been renewed.

Koch's response to this Motion conceded that the allegations concerning the 1986 renewal of staff privileges failed to bring forth an actual case or controversy, and submitted the Plaintiff's Third Amended Complaint to cure this defect. In this Third Amended Complaint, Koch alleged that the hospital, through its CEO, was attempting to change its by-laws "so as to permit greater ease in denying or restricting staff privileges to doctors on the medical staff who oppose hospital policies." The new Count V did not allege that these new by-laws had been enacted or were being enforced, but rather alleged that they had been sub-

mitted to the hospital administration for review and possible implementation. To date, Koch has not alleged or argued that these new by-laws have been enacted or enforced.

In their reply memorandum, the Defendants asserted that the allegations of Koch's Third Amended Complaint failed to cure the case or controversy deficiency. The Defendants argued that the possibility of by-law changes which might result in deprivation of Koch's First Amendment rights does not create a current injury required for a justiciable controversy. As the Defendants phrased it, the "Defendants are claiming that [the hospital CEO] has been attempting (thus far unsuccessfully) to do something which, if successful, will make it easier to do something in the future."

It is well-settled that federal courts only possess jurisdiction over actual cases or controversies.

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional question. Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

*Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citations omitted). Moreover, to possess standing, a plaintiff must be able to demonstrate that the injury he has sustained is likely to be redressed by a favorable decision. *Valley*



*Forge College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472 (1982). The requirement of an actual or threatened injury is not satisfied where a plaintiff alleges only that a rule is in power which *may* serve to violate his constitutional rights. *See Council No. 34, American Fed. of State, C. and M. Emp. v. Olgivie*, 465 F.2d 221, 225-26 (7th Cir. 1972).

Koch cannot satisfy this requirement. He conceded, as he must, that no actual injury arose from the staff privilege's review in 1986 because those privileges were actually renewed. But further, Koch's new allegations that the proposed by-law amendments *might* serve, *if* adopted, to curtail his First Amendment rights fails to establish an injury as required by the authorities noted above. The Defendants accurately summed up the deficiencies of Koch's claims in this regard:

> But even if [the hospital CEO] were to succeed tomorrow in persuading the appropriate decision makers to amend the medical staff by-laws, Koch would suffer no injury from the fact of the amendment. If the medical staff by-laws are amended, and if they make it easier to remove physician's staff privileges, and if an attempt is made to remove Koch's staff privileges, and if that attempt is motivated by Koch's protected speech, Koch can have his day in court. But until all those "ifs" become reality (or at least a "real and immediate" threat), Koch has no standing under Article III.

Defendants' reply memorandum in support of Motion to Dismiss Count V of Third Amended Complaint, filed October 29, 1990, at p. 5.

B. *Failure to State a Proper Claim*

With Koch's allegations dismissed for lack of case or controversy, the focus on Count V shifts to the injuries

alleged therein by Churchill. Churchill alleges that her termination by the Defendants also amounted to a deprivation of her First Amendment right to freedom of "expressive association." The Defendants argue that this claim cannot survive because Churchill has failed to state a proper claim for the violation of this right.

The right to "expressive association" is a "judge-made corollary" to the free-speech clause of the First Amendment. *See Swank v. Smart*, 898 F.2d 1247, 1250 (7th Cir. 1990). The right to expressive association has been defined by the Supreme Court as "a right to associate for the purpose of engaging in those activities protected by the First Amendment. . . ." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *see also Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). Thus, the constitutional guaranty of expressive association is a protection of the right of individuals to join together or associate *for the purpose of* expressing ideas. This right is not implicated when two persons simply hold common beliefs or even when those different persons express those common beliefs—they must join together "for the purpose of" expressing those shared views.

Churchill's allegations fall well short of this mark. In ¶¶24 and 25 of her Third Amended Complaint, Churchill alleges that she "shared many of Dr. Koch's reviews respecting nurse staffing" and that the Defendants "perceived that Plaintiffs Koch and Churchill were associated in their opposition to cross-training." Such allegations do not create an expressive association claim. Nowhere is it alleged that Koch and Churchill joined "for the purpose of" expressing those shared views. Count V alleges only that the views were jointly held. Moreover, Count V suggests that Koch and Churchill actually associated for more personal reasons—¶24 states that in 1986 Churchill became



"both a professional supporter and personal friend of Dr. Koch's." Thus, aside from failing to allege (as it must to survive) that Churchill and Koch associated for the purpose of expressing their shared views, Count V actually alleges that they associated for more personal reasons.

The next question is what remains of Count V after Koch's claims are dismissed for lack of a case or controversy and Churchill's expressive association claim is dismissed for failure to state a proper claim? The answer is nothing. Although Count V might be read to allege additional free speech violation on behalf of Churchill, Plaintiffs' counsel noted in his memorandum that Count V was not intended to allege such claims because they are already contained in Counts I and III. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and/or Strike Count V of Second Amended Complaint, at p. 12. Indeed, even if counsel had not conceded as much, any remaining Count V allegations setting forth free speech claims by Churchill would be duplicative of Counts I and III and would be properly stricken. Therefore, Count V is properly dismissed for lack of a case or controversy and for failure to state a proper claim for relief.

## II. *Defendants' Motion for Summary Judgment as to Counts I and III*

On October 9, 1990, the Defendants also moved for summary judgment on Counts I and III. In Count I, Churchill alleges that the individual Defendants violated her First Amendment right to free speech by terminating her in retaliation for her exercising that right. Count III alleges that MDH is also responsible for this First Amendment violation because the individual Defendants acted pursuant to an official hospital policy. This Court previously considered this same issue in its February 16, 1990 order.

In that order, this Court denied the Defendants' Motion for Summary Judgment, citing to disputes of fact. Specifically, this Court believed that disputes existed regarding what Churchill actually said in the kitchen area of the OB department and whether such speech was actually the motivating factor in Churchill's termination.

First was the issue of what Churchill said to Melanie Perkins-Graham in the kitchen area of the OB department on January 16, 1987. According to Churchill, all she said to Perkins-Graham at that time was that the cross-training policy and inadequate nurse staffing at MDH were having an adverse effect on patient care. (Churchill deposition, pp. 342-44). According to Perkins-Graham, the conversation was somewhat more specific. Perkins-Graham recounted that Churchill discussed her (Churchill's) relationship with Cindy Waters and how they did not get along and were unlikely to get along in the future. (Perkins-Graham deposition 9/15/87, pp. 74-76). Further, Perkins-Graham recalled that Churchill had said that Cathy Davis was going to ruin the hospital. (*Id.* at 78). Mary Lou Ballew, who overheard portions of the conversation and reported it to Churchill's supervisors, had yet a slightly different account. She recalled that Churchill criticized the OB department in general and had told Perkins-Graham that the department was not well-managed. (Mary Lou Ballew deposition 8/27/87, p. 107). Ballew felt that Churchill's comments were intended to dampen the enthusiasm of Perkins-Graham to participate in cross-training or to join the OB nursing staff. (*Id.* at 94-5, 98). Based on these factual differences and the dispute as to what actually precipitated Churchill's termination, this Court declined to grant summary judgment in the February 16, 1990 order.

On reconsideration via the present pending summary judgment motions, this Court now finds that no dispute



of *material* fact exists and that summary judgment is appropriately entered in favor of the Defendants. Even assuming that Churchill's statements to Perkins-Graham were the reason for her discharge, those statements (regardless of the version) were, as a matter of law, not protected speech, and therefore any termination in response to them does not violate Churchill's First Amendment rights. Moreover, even if Churchill's speech were protected, the balancing approach of *Pickering v. Board of Education*, 391 U.S. 563 (1968) favor upholding the Defendants' actions any denying Churchill's claims.

A. *Protected Speech*

No matter what alleged speech content is analyzed (that allegedly stated by Churchill in the kitchen area of the OB department or that reported to the Defendants by Ballew and Perkins-Graham), such speech is not protected. All of the versions of Churchill's statements have a common denominator—all are indicative of an attempt to simply air personal grievances rather than to speak out on an issue of public concern. As such, Churchill's statements are not entitled to First Amendment protection.

The Seventh Circuit recently summed up the interests which pervade First Amendment jurisprudence.

> The purpose of the free-speech clause and of its judge-made corollary the right of association is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and does not protect it. Such conversation is important to its

> participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment.

*Swank v. Smart*, 898 F.2d 1247, 1250-51 (7th Cir. 1990) (citations omitted). In accordance with these objectives, courts balance competing interests in situations such as that present here where a public employee was terminated in retaliation for something he or she said.

> An individual does not lose his First Amendment to freedom of speech because he is employed by the government. A balance, however, must be made between the rights of a government employee to comment on matters of public concern and the right of the government, as an employer, to promote the efficiency of its public services. Accordingly, in deciding whether the government has wrongfully deprived an employee of his right to freedom of speech, our initial inquiry is whether the employee was speaking on matters of public concern.

*Gray v. Lacke*, 885 F.2d 399, 410 (7th Cir. 1989) (citations omitted). The "public concern" test mentioned in *Gray* came from the Supreme Court's opinion in *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, the Supreme Court stated that:

> When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147. Whether particular speech is on a matter of "public concern" is a question of law for the Court.



*Id.* at 148, n.7; *Phares v. Gustafsson*, 856 F.2d 1003, 1007 (7th Cir. 1988).

As noted by the Supreme Court in *Connick*, "[w]hether an employee's speech addressed a matter of public concern must be determined by the content, form, and context of a given statement . . ." 461 U.S. at 147-48. *See also Breuer v. Hart*, 909 F.2d 1035, 1307-39 (7th Cir. 1990). The Seventh Circuit has opined that the content prong of the *Connick* test is the most important factor in determining whether certain speech is of public concern. *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984). The question is, given these standards, whether Churchill's conversation with Melanie Perkins-Graham on January 16, 1987 dealt with a matter of public concern.

Examining the content, form, and context, this Court is of the opinion that Churchill's speech was not on a matter of public concern. Although portions of the content of Churchill's statement to Perkins-Graham may have concerned issues that were of general interest to the public (such as the quality of care for patients in the OB department at MDH), the form and content of those statements indicate that they were not made to educate the public (or even Perkins-Graham for that matter) about problems in OB, but rather to air Churchill's personal feelings about her supervisors at MDH. Churchill did not espouse her opinions to a public audience or to authorities with power to make changes in policy. Rather, Churchill was repining to a co-worker in a coffee-room atmosphere. Such conversation is akin to "casual chit-chat between two persons" (*see Swank*, 898 F.2d at 1251) and is therefore not protected.

Moreover, the context of Churchill's statements further demonstrates that her objective was not to inform but

rather to gripe. The record in this case reveals a history of hostility between Churchill and her supervisors at MDH. Indeed, the text of Churchill's statements to Perkins-Graham about the impossibility of reconciliation with Waters because "too many things had happened" (Melanie Perkins-Graham deposition, p. 74) between them reinforces the evidence in the record concerning this long-standing feud. When put in the context of this repeated in-fighting, it is clear that Churchill's purpose or motive in making these statements to Perkins-Graham about problems in OB was to air her own personal grievances with Cindy Waters and other Defendants, and not to speak out on matters of public concern. Since Churchill "was speaking in her role as an employee about her personal feeling and not in her role as a citizen on a matter of public concern," her speech is not protected. *Yoggerst*, 739 F.2d at 296. When the purpose of an employee's expression of dissatisfaction with an employer are simply to air those feelings of dissatisfaction rather than to enlighten others on matters of public concern, the speech is not protected. *Id.*; *Linhart*, 771 F.2d at 1010; *Gray*, 885 F.2d at 411.

B. *Pickering Balance*

Generally, if a court determines that speech which prompted the discharged of a government employee is not of public concern, the inquiry ends and the court may find in favor of the employer. *See Breuer*, 909 F.2d at 1037. The balancing approach of *Pickering v. Board of Education*, 391 U.S. 563, is employed where the speech is first found to be of public concern—if the balancing of interests favors the employer, the termination may stand even though the speech was of public concern and therefore protected.



In *Breuer*, the Seventh Circuit summarized the balancing approach of *Pickering*.

> Under *Pickering*, the public employer's burden in attempting to justify the discharge of an employee for activities and statements involving matters of public concerns depends on various factors, which have been summarized by this Court:
>
> > (1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.
>
> The court in *Connick* placed special emphasis on the fourth point: "When close working relationship are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."

909 F.2d at 1039-40 (citations omitted). Applying the factors noted in *Breuer*, it is clear that the balancing favors the Defendants. Factors (1) and (4) deal with the need to foster healthy working relationships between an employee and her supervisors and co-workers. In this Court's opinion the type of criticism which Churchill voiced to Perkins-Graham about her superiors was inherently disruptive to these interests and justified termination. Thus, even if Churchill's remarks to Perkins-Graham were protected speech on matters of public concern, the Defendants would be entitled to summary judgment under the *Pickering* balance.

III. *Count III*

Given the Court's ruling on Count I against the individual Defendants, Churchill's free speech claim against the hospital in Count III also fails. Count III alleges that the individual Defendants' actions in violating Churchill's First Amendment rights were done pursuant to an official policy at MDH, thereby making the hospital liable as well. Since this Court has found that no First Amendment violation occurred, there can be no violation pursuant to an official policy and MDH is entitled to judgment in its favor on Count III.

IV. *Counterclaim*

Since judgment is entered in favor of the Defendants as to all of the Plaintiff's claims, the Defendants' counterclaim against Koch for indemnity is moot.

CONCLUSION

For the reasons set forth above, this Court hereby GRANTS the Defendants' Motion to Dismiss Count V of the Third Amended Complaint. Further, this Court hereby GRANTS the Defendants' Motion for Summary Judgment as to Counts I and III of the Third Amended Complaint. Since this Court already granted summary judgment on Counts II and IV of the Complaint in its order of February 16, 1990, the Plaintiff's entire Complaint fails. Accordingly, judgment is hereby entered in favor of the Defendants and against the Plaintiffs.

ENTERED this 17th day of May, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge



[DATED FEBRUARY 16, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

| | | |
|---|---|---|
| CHERYL R. CHURCHILL, Plaintiff, | ) | |
| v. | ) | Case No. 87-1117 |
| CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation, Defendants. | ) | |

**ORDER**

Plaintiff Cheryl Churchill has sued the Defendants pursuant to 42 U.S.C. § 1983 and Illinois law, alleging that termination of her employment as a nurse at McDonough District Hospital violated her First and Fourteenth Amendment rights, as well as breaching her employment contract. Specifically, in Count I, Plaintiff charges the individual Defendants with violation of her First Amendment rights. Count II charges the individual Defendants with violation of her Fourteenth Amendment rights to due process. Count III alleges that the hospital violated her First Amendment rights. Count IV alleges a common law breach of contract against the hospital.

Argument was heard on Defendants' Joint Motion for Summary Judgment on December 20, 1989. For the reasons stated below, the Motion for Summary Judgment is granted as to the Fourteenth Amendment claims and the

state law contact claims. The Motion is denied as to the First Amendment claim because of the existence of disputed issues of material fact.

## FACTS

Cheryl Churchill was hired as a part-time nurse in Obstetrics by McDonough District Hospital (hereinafter "MDH") on October 25, 1982. On September 16, 1985 she began work as a full-time nurse in Obstetrics. On January 27, 1987 she was discharged by the hospital.

In April of 1986 Defendant Kathy Davis was hired by MDH as Vice-President of Nursing. Soon after her appointment, Davis made a number of changes in nursing practices, including the implementation of what is known as "cross-training." Cross-training involved pulling full-time nurses from general medical areas of the hospital and training them in more specialized nursing areas, such as obstetrics, so that the cross-trainees could provide flexible staffing as needed. The institution of this new policy was rather controversial, triggering a certain amount of controversy and discussion among medical and nursing staff at the hospital.

Among those opposing cross-training was the Plaintiff, while the individual Defendants all supported it. According to Churchill, she participated in a number of conversations about cross-training with other staff of the hospital.

On August 21, 1986 a medical emergency ("code pink") developed in the Obstetrics Department. The doctor on duty was Thomas Koch, M.D., the clinical head of the Obstetrics Department. A probationary employee, Mary Lou Ballew, was ordered by Dr. Koch to sound the alert for the "code pink." She did not know what to do and failed



to alert all the necessary medical personnel. Koch directed Churchill to prepare the delivery room for the impending emergency Caesarean Section and then himself secured the "code pink" alert.

During the surgical procedure, Defendant Cynthia Waters arrived in the delivery room. She asked Churchill about one of Churchill's patients who had recently delivered and was in the recovery room. Churchill checked on the patient and returned to the delivery room. Once again, Waters asked her about her patient. In response, Churchill said, "You don't have to tell me how to do my job." At that point, Dr. Koch reprimanded Waters, informing her that she was out of line in interfering with his orders to Churchill. Nonetheless, Churchill left the delivery room. After the operation, Dr. Koch again approached Waters to discuss her conduct. Waters, however, would not discuss the matter with Koch. Instead, she contacted Defendant Stephen Hopper, the President and CEO of MDH.

Subsequently, Hopper held a conversation with Koch and Waters, as well as another nurse, Marsha Clausen. Dr. Koch not only complained about Water's behavior, but expanded the conversation to include general complaints about the new nursing policies implemented by Davis and Waters.

Kathy Davis, who had been unavailable for that meeting, was contacted by Hopper and Waters later. Hopper, Davis, and Waters met on August 22 and August 25, 1986, and decided to issue a written warning to Churchill for insubordination based on her response to Waters in the delivery room. The written warning was presented to Churchill on a special form on August 25. The warning read as follows:

> REASON FOR WARNING: (1) Insubordination—when had to be asked twice to leave the delivery room, you responded to me [Waters] in a very hostile manner, "I don't need you to tell me how to do my work." (2) General negative attitude and lack of support toward nursing administration in the OB Department.
>
> WARNING GIVEN: Insubordination and/or lack of cooperation will not be tolerated in the future as it is very detrimental to the operations of the OB Department. Any future occurrence of this behavior will be subject to further disciplinary action which may include assignment to another nursing area or discharge.

In Churchill's deposition she acknowledged that, although she could have submitted a written response, she chose not to do so saying that she did not wish "to make mountains out of molehills." She also did not file a grievance protesting this warning.

On January 5, 1987 Churchill received her annual evaluation from Waters. The evaluation showed standard or strong performances in every area of the evaluation and reflected no areas of weakness. At the end of the evaluation, Waters wrote:

> Cheryl exhibits negative behavior towards me and my leadership—through her actions and body language, i.e. no answer, one word abrupt answers followed by turning and leaving, blank facial expressions, or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation.

In the conversation between Churchill and Waters which accompanied the evaluation, Waters did not mention the handwritten comments at the end of the evaluation, and Churchill made no response either orally or in writing nor did she file a grievance.



On January 16, 1987 Cheryl Churchill began work on the 3:00 to 11:00 p.m. shift. The nurse in charge was Jean Welty. Other nurses working the same shift included Mary Lou Ballew and Melanie Perkins-Graham. Following departmental custom, Churchill and Perkins-Graham were eating their dinner in a kitchen area situated behind the main nurse's station in Obstetrics. Ballew and Welty were at the main desk. Dr. Koch walked into the department and went into the kitchen area where Churchill and Perkins-Graham were eating. Welty remained at the front desk while Ballew (the nurse present in the delivery room during the previously discussed incident involving Churchill, Koch and Waters) heard parts of the subsequent conversation in the kitchen; however, she was not at the desk or in the kitchen area for the entire course of the conversations since she was answering patient lights and performing other nursing duties.

Perkins-Graham told Koch that she was in the department for cross-training and was thinking about transferring to Obstetrics permanently. The subsequent conversation involved general criticisms and comments about the cross-training policy. Welty overheard Koch express his general views about cross-training and his reasons for disliking that policy. She also heard Churchill agree with Koch and say that Kathy Davis' policy was going to "ruin the hospital," and that some aspects of the cross-training program might violate certain state regulations. Welty also heard Perkins-Graham contribute her views to the conversation, and indicate that, while she was interested in transferring to the OB Department, she was reluctant because she had heard so many bad things about Cindy Waters. Welty heard Churchill encourage her to transfer, saying that Cindy Waters had a hard job but good intentions and that she was sometimes moody.

Ballew overheard only segments of this conversation. Apparently, she construed those portion she heard as negative and intended to dampen the enthusiasm of the cross-trainee, Perkins-Graham. Because of this, Ballew reported the conversation tc Waters, who went to Hopper on January 21 and advised him of the conversation. Hopper, who wanted to include Kathy Davis, held a meeting the next day at which Davis, Waters, and Hopper decided to talk to Perkins-Graham. On January 23, Perkins-Graham was summoned to Davis' office. When she arrived, accompanied by her supervisor, she agreed that Churchill had said unkind and inappropriate negative things about Cindy Waters and had said that things in general were not good in OB as a result of hospital administration policies. She repeated Churchill's comment about Kathy Davis "ruining the hospital" but admitted that she could not remember the conversation very specifically.

On January 26, 1987, Waters, Davis, Hopper, and Bernice Magin (Personnel Director of MDH) held a meeting at which they decided to discharge Churchill. The next day when Churchill arrived at work, Waters summoned her to Davis' office. There, Churchill was advised by Waters that, because she had continued to undermine the department and the hospital administration, Waters had no choice but to fire her. Bernice Magin explained how Churchill's benefit package would work following her discharge, discussed her final paycheck, and later explained to her the grievance procedure at the hospital.

Pursuant to the hospital's grievance procedure, Hopper reviewed the grievance Churchill filed. Churchill did not know and was not told of Hopper's involvement in the decision to fire her. Hopper decided that there had been three warnings beginning with the written warning following the delivery room incident. The second warning, he



concluded, was the written criticism at the end of the Churchill's evaluation. He concluded that Churchill's conversation on January 16 was a third offense within 12 months and therefore upheld the discharge.

At his deposition, Hopper testified that he found Churchill's comments about Davis and Waters objectionable not only because of their negative, insubordinate content, but also because she was voicing her concerns during working hours to the wrong forum. He viewed Churchill's conflict with Waters as a personal dispute which interfered both with department operations and with the hospital's cross-training policy.

At the time Churchill was first hired by MDH on a part-time basis, she was given a copy of the hospital's written statement of its employee relations guidelines, entitled Statement of Wages, Hours, and Employee Relations Practices-Human Resources Practices (hereinafter "handbook"). A number of provisions in the handbook are very important to this case.

First, on page 5, the handbook states its purpose including in relevant part the following:

> The intent of these Human Resources Policies is to set forth all those basic matters regarding conditions of employment, rates of pay and hours of work to be observed by both the hospital and by all those employees covered by this Statement of Purpose.
>
> The conditions and procedures established in these policies are intended to spell out the mutual employment relationship between the hospital and its employees, so as to assure:
>
> 1. Complete cooperation of all hospital personnel, and
>
> 2. Fair adjustment of any differences that may arise in the employee-employer relationship.

> Scheduling and assigning of work, the direction of the hospital staff, its expansion and reduction, the control and location of operations including when, where, and by whom work shall be performed, and the determination of the means, methods, processes, schedules and standards of performance are the responsibility of the hospital.
>
> Enactment of these responsibilities by the hospital will be completed within the specific and expressed outlines as provided in these policies . . .
>
> The mutual interest of all employees and the hospital calls for the continued successful promotion and development of unexcelled patient care. The basic purpose of this statement is to contribute toward such goals through the observance by both the hospital and each employee of the provisions and intent of these Human Resources Practices.

The next page of the handbook is a letter from Hopper in which he emphasized that, although the hospital's primary aim was to provide outstanding medical care, the main factor in successfully achieving that aim was the hospital's employee:

> An employee must not only do a good job, but should enjoy doing that job. Satisfied employees are men and women who TAKE PRIDE in their work, who feel their jobs are WORTHWHILE, and who know their efforts and their work is RECOGNIZED. In recognition of these human values, we have established the following Human Resources objectives:
>
> . . .
>
> 9. To respect the individual employee's rights and assure employees of their right to freely discuss with supervision any matter concerning their own or the hospital's welfare. . .
>
> . . .
>
> To implement these aims in a spirit of friendliness and cooperation, we have established Human Resources Policies which are put into effect through systems and procedures. We believe that neither the hospital nor its employees can succeed unless these objectives, these policies, and these procedures, are known, understood, and observed by all.

[emphasis in original]



Article I of the handbook is entitled General Information. In Section 1.05, it provides:

> Insofar as practical, exceptions to these Practices will be avoided. These Human Resources Practices will be periodically reviewed and adjustments will be made based on practices of other employee units in the area, as well as other economic considerations. Should an exception to these Human Resources Practices be in order, the request in writing, for approval for such an exception should be made; and the approval received from the President/CEO or his designate.

Section 1.06 provides:

> These Human Resources Practices are provided to insure that all personnel understand their respective roles and responsibilities, and that each employee covered by these Practices is afforded job security and means of redress, should a misunderstanding occur between the employee and his/her immediate supervisor.
>
> *The contents of this handbook are presented as a matter of information only and the language contained herein is not intended to constitute a contract between McDonough District Hospital (MDH) and you, the employee.*
>
> Except for the necessary rules and regulations regarding expected conduct and behavior, the plans, policies and procedures described herein are not to be considered conditions of employment. MDH retains the rights to change, revoke, suspend, modify or ter-

> minate any or all such plans, policies, and procedures in all or in part at any time with or without notice.

[emphasis in original].

Article II of the handbook is called Employment Status. In § 2.01, entitled "ESP" (Employment Security Policy), the handbook states that MDH "offers each employee 'Job Security' based on your productivity, the quality of your work and your loyalty to the hospital." Article II goes on to define four different types of employee and states that all new or rehired employees are characterized as probationary during the first ninety calendar days of continuous employment. Section 2.04 states that "During the Probationary Period, termination of employment may be made without prejudice to either the employee or the hospital. Thus, no notice of termination by either the Hospital or the employee during the Probationary Period will be necessary."

Section 2.06 provides that an employee's employment can be terminated for six reasons: discharge for cause, voluntary resignation, retirement, layoff, failure to report to work following a layoff, unreported or unverifiable absences for three days or more. Discharge for cause is not defined in Section 2.06.

Article IX of the handbook, entitled Resolving Differences, states that the procedure in Article IX provides "the sole and exclusive remedy for any employee who believes the hospital has violated these Human Resources Practices in any way." Section 9.02 reassures that grievances may be expressed without fear of prejudice or reprisal.

The grievance procedure set out in Section 9.03 consists of three steps. Step 1 is departmental review. It requires that the employee present in writing to his or her departmental director the claim. The director is to consider the problem and attempt to reach a settlement within 7 calendar days.



If step 1 does not resolve the problem, the complaint proceeds to step 2 which is administrative review. This step requires that the employee present the grievance in writing to the Vice-President of Human Resources who is to hold a conference with the employee, the Vice-President In Charge and the Vice-President/Human Resources. The problem is to be considered by the Vice-President In Charge and settlement is to be attempted.

If there is no resolution within 7 days, the employee is to proceed to step 3 at which time the grievance is presented to the hospital President/CEO in writing. The President is to conduct a thorough investigation and deliver a written decision with 10 days. Article IX provides that the President/CEO's decision shall be final and binding for all purposes on the employee and the hospital.

Article IX also provides that if the subject of the employee's complaint is the employee's department director, the employee may proceed directly to step 2. In the case before the Court, the employee was permitted to proceed directly to step 3 since her complaint not only concerned her department director but also the Vice-President In Charge.

Article X of the handbook, entitled Discipline, sets forth general guidelines for discipline of employees. The important sections are set forth below. In all the below guidelines, emphasis has been added to call attention to precatory and mandatory language.

> 10.02 DISCIPLINE AND CODE OF CONDUCT
>
> Any time a group of people work closely together in a business situation, there must be some guidelines

and rules to assure a safe, efficient business operation; to assure compliance with the public law; and to protect the well-being and rights of patients and of all employees. Many of the MDH rules will be readily understood and observed by individuals who qualify for MDH employment, since they are the same rules which guide behavior in relationships with other people anywhere in any social or business relationship. Other work rules and practices are more applicable to people working together in the health care environment of McDonough District Hospital.

Discipline, whether a warning, suspension or discharge is given for the purpose of preventing a recurrence of behavior which is unacceptable. It is in no sense designed to humiliate or retaliate. *In every case*, the employee *shall be given* ample opportunity to state his case and discuss his point of view.

At the first indication that any MDH employee is becoming lax in following our practices and work rules, but where formal disciplinary action is not indicated, the employee's Department Director/Supervisor *will discuss* the situation with him/her to insure a clear understanding of what is expected. Should the employee fail to correct the situation, the Department Director/Supervisor *may* then decided to take formal disciplinary action.

10.02 DISCIPLINE—GENERAL GUIDELINES

a. Discipline *may be* initiated for various reasons including, but not limited to, violations of work rules, insubordination or poor job performance. The severity of the action depends on the nature of the offense, and the employee's record, and *may range* from verbal counseling to immediate dismissal.

b. The *normal* progressive discipline procedure consists of:



1. Verbal counseling
2. First written warning
3. Final written warning, which may include suspension
4. Discharge

Any or all of these steps *may be* utilized, depending upon individual circumstances and the nature of the infraction. Moreover, exceptions or deviations from the normal procedure *may occur* whenever Administration deems appropriate.

c. Progressive discipline must be timely and should follow, as closely as possible, the incident requiring the disciplinary action.

10.03 PROGRESSIVE DISCIPLINE

a. With the exception of offenses requiring more stringent action, employees will *normally* be counseled once verbally before receiving a written warning.

b. In the event of another performance problem or a violation of any hospital policy, a written warning will *ordinarily* be issued.

1. The warning *should* be signed and dated by the employee . . .

2. The warning *should* inform the employee of the possible consequences, including final written warning, suspension and/or discharge, should additional violations or performance problems occur . . .

c. If a third offense occurs within twelve (12) months of the previous written warning, a final warning *should* be issued.

d. If the employee violates a hospital policy or fails to improve performance, termination *may* result.

> McDonough District Hospital *reserves the right to deviate* from this policy when circumstances warrant such a deviation.
>
> Formal disciplinary action *shall be applied* by management *according to the circumstances* and the offense involved in each individual case.

The next section lists several examples (explicitly *not* all-inclusive) of offenses for which a written warning will "ordinarily" be issued. One of those offenses is the failure to carry out a supervisor's specific instructions. None of the other examples are relevant to this case.

The next section sets out offenses which are of such a nature that they *may* result in suspension without pay. In addition, the handbook states that repetition of one of these offenses will *usually* result in discharge. The example includes willful refusal to obey a supervisor. None of the other examples are pertinent.

The final section in Article X lists examples of action and behavior that normally warrant discharge without prior warning. None of the examples are relevant to this case.

Finally, in Article XII, Section 12.01, entitled Reservation of Rights, the handbook states:

> It is impracticable, and probably impossible, to attempt to set forth in these Human Resources Practices answers to all the possible employment problems which may arise. Further, it is essential to effective operation of the Hospital that Hospital management retain the responsibility and right to direct and manage the Hospital and the staff in the manner the Hospital considers best designed to carry out the Hospital's health care delivery obligations. Therefore, *except to the specific extent that a subject with respect to the employment relationship is covered in this Statement*



> *of Human Resources Practices, the Hospital expressly retains the right to take any action which does not conflict* with the provisions of this Statement of Human Resources Practices or applicable law.

[emphasis added].

**FOURTEENTH AMENDMENT DUE PROCESS CLAIM**

In their Motion for Summary Judgment, the Defendants argue first that Churchill had no property interest in her employment under Illinois law. The Defendants correctly point out that under Illinois law, the Plaintiff must show that the handbook created a legally enforceable expectation of continued employment pursuant to *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill.2d 482, 505 N.E.2d 314, 106 Ill.Dec. 8 (1987).

In *Duldulao*, the Illinois Supreme Court ruled that a handbook creates enforceable contract rights where the traditional requirements for contract formation are present. First, the language of the policy statement must contain a promise clear enough that an employee could reasonably believe that an offer had been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, an employee must accept the offer by commencing or continuing to work after learning of the policy's statement. *Id.* 505 N.E.2d at 316, 106 Ill.Dec. at 10.

In *Duldulao*, the court found that the employee handbook had created enforceable rights because there were very clear promises made. For example, the handbook stated it was designed to "clarify your rights" and that after probation an employee would become a permanent employee and "termination . . . cannot occur without

proper notice and investigation." In addition, it stated that "permanent employees are never dismissed without prior written admonitions and/or an investigation" and that "three warning notices . . . are required before an employee is dismissed." 505 N.E.2d at 316, 106 Ill.Dec. at 10. In addition, the handbook sets out a list of examples which would justify immediate dismissal without notice and another list of offenses which were specifically not subject to immediate dismissal. The court held that an employee reading the handbook would reasonably believe that, except in the case of the specific listed offenses, he or she would not be discharged without prior written warnings. *Id.* 505 N.E.2d 319, 106 Ill.Dec. at 13.

The court also considered it significant that the handbook contained no disclaimer to negate the promises made. To the contrary, the introduction to the handbook stated that the policies in the handbook "are designed to clarify your rights and duties as employees." *Id.*

The legal impact of a disclaimer was further examined in the case of *Yocum v. Show Biz Pizza Time, Inc.*, No. 88-3128, (N.D.Ill. Feb 21, 1989) (1989 WL 15961). In that case, the employee handbook outlined the guidelines and policies of employment, provided specific employee rules, and spelled out which violations would result in immediate dismissal and which would result in a lesser form of remedial action. In addition, the handbook contained a conspicuous disclaimer reading "Our relationship is, and always will be, one of voluntary employment 'at will.' " The court first refused to find that the handbook promised that employees could only be fired for cause, stating that "a negative inference . . . certainly cannot provide the basis for the type of clear promise that *Duldulao* contemplated." *Id.* at 4. In addition, the court held that the clear language of the disclaimer meant that it would be unreasonable for



a plaintiff to believe that he was being offered a job in which he could be fired only for cause. *Id.*

In *Doe v. First National Bank of Chicago*, 865 F.2d 864 (7th Cir. 1989), the Seventh Circuit also considered a disclaimer contained in an employee handbook. The disclaimer stated in full "Neither this policy nor any provision of this policy manual is intended to set forth the terms and conditions of an individual's employment or termination of employment, to constitute a contract of employment, or to confer any additional employment rights. Employment can be terminated at any time and for any reason by either the employee or FCC" *Id.* at 873.

In addition to the handbook, the employees in *Doe* received a memorandum which described major and minor offenses and which provided that employees could be disciplined or discharged for the listed misconduct but which never promised that specific disciplinary procedures would be used.

The Seventh Circuit held that the employee manual in combination with the memorandum, did not create enforceable rights. Specifically, the Court held that the manual could not as a matter of law constitute a contract since

> We fail to see how a document which clearly disclaims in unambiguous language any purpose to bind the parties can constitute a promise clear enough that an employee would reasonably believe that an offer has been made. [citation omitted].

*Id.* Thus, the basis for the Seventh Circuit's finding was a failure to find an intent to be bound which, after all, is what an offer of contract is.

A comparison of the handbooks in *Duldulao* and *Doe* with MDH's handbook leads the Court to conclude that

MDH did not make any promises sufficiently clear that it would have been reasonable for Churchill to believe it was an offer. Specifically:

In *Duldulao*, there was no disclaimer, while in *Doe* as in this case, there is one. Plaintiff argues that the disclaimer here is a legal conclusion, i.e. since under Illinois law such legally conclusory language is insufficient to form the existence of a contract, the opposite must also be true; if the disclaimer does not assert that employment is *at-will*, then the statement that no contract is intended cannot be construed to bar contract formation.

The Court disagrees for several reasons. First, the disclaimer expressly disavows any intent to be bound, which was the factor on which the Seventh Circuit relied in *Doe*. Second, the disclaimer doesn't *only* say that there is no contract intended, as Plaintiff claims. Rather, it says that the contents are "presented as a matter of information *only*," which belies any intent to be bound. Third, in the paragraph immediately after the disclaimer, the handbook states that its contents are not to be considered conditions of employment, as did the disclaimer in *Doe*.

Most importantly, however, Plaintiff assumes that this disclaimer is inconsistent with the rest of the policy, and that, in its absence, Plaintiff's property right would be clear. This assumption is incorrect.

In *Duldulao*, the letter from the hospital president to employees stated that the policies were designed to clarify their *rights*. In *Doe* (although this factor was not discussed), the policy manual spoke in terms of "guidelines." In this case, the contents of the handbook are referred to alternatively as Policies, Practices and Guidelines.

In *Duldulao*, the procedures for discipline were emphatically mandatory: "never dismissed," "required," "cannot



occur." In *Doe*, the Court noted that the precatory language contained no promise that specific procedures would be used. In this case, Article X (Discipline) is written entirely in language which is obviously intended to suggest guidelines and nothing more ("may be," "normal procedures," "ordinarily," "should"). It is accompanied by explicit reservations: exceptions are allowed under § 10.02(b) whenever administration deems appropriate; MDH reserved the right to deviate from the progressive discipline policy when circumstances warrant under § 10.03; in Article XII, MDH reserved its right to take any action which does not conflict with a specific portion of the handbook.

There are some aspects of the handbook which might, if read in isolation, seem to indicate an offer. For example, Plaintiff claims that MDH explicitly *offered* job security, a promise missing in both *Doe* and *Duldulao*. She relies on § 2.01 which does indeed use the word "offer." However, that single word cannot be read in isolation. Nor can an "offer of job security" be any more than a general statement; it is certainly *not* a clear promise.

As a whole the handbook does not constitute a promise clear enough for an employee to reasonably believe that an offer was made. *See also*, *Harrell v. Montgomery Ward & Co.*, 189 Ill.App.3d 516, 545 N.E.2d 373, 136 Ill.Dec. 849 (1st Dist. 1989) (holding that the existence of a promise is a question of law to be determined by the court); *Tolbert v. St. Francis Extended Care Center*, 189 Ill.App. 3d 503, 545 N.E.2d 384, 136 Ill.Dec. 860 (1st Dist. 1989) (holding that an employer's promise not to discharge except for just cause is not a sufficient promise to constitute an offer); *Koch v. Illinois Power Co.*, 175 Ill.App.3d 248, 529 N.E.2d 281, 124 Ill.Dec. 461 (3rd Dist. 1988), app. denied 535 N.E.2d 915, 129 Ill.Dec. 150 (1989) (general statements and guidelines for discipline could not reasonably

be construed as an offer); *Mursch v. Van Doren Co.*, 851 F.2d 990 (7th Cir. 1988) (repeated use of non-mandatory language evinces a clear intent not to create a binding agreement).

For this reason, Churchill had no enforceable property interest granted to her by the handbook. Absent a property interest in continued employment, Plaintiff cannot proceed on her due process claim and summary judgment would be proper on this basis alone.

Even if, however, this Court had found that Churchill had a property interest in continued employment, several recent Seventh Circuit cases would mandate dismissal of her due process claim.

In *Easter House v. Felder*, 879 F.2d 1458 (7th Cir. 1989), the court discussed the Supreme Court's recent pronouncements in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), in which the Supreme Court held that a random and unauthorized intentional deprivation of property by a state employee does not constitute a violation of procedural due process if a meaningful post-deprivation remedy is available. The underlying principle of *Parratt* was to prevent turning the Fourteenth Amendment into "a font of tort law to be superimposed into whatever systems may already be administered by the state." *Id.* at 544.

In *Easter House*, the plaintiff contended that *Parratt* did not apply where the property deprivation had resulted from actions of high level state and local officials engaged in a conspiracy to violate a citizen's constitutional rights. The Seventh Circuit first found that a conspiracy could be a random act, if, from the point of view of the state, the state could not have anticipated or controlled the conduct in advance. 879 F.2d at 1469.



Next, the Seventh Circuit considered whether actions of high level state employees could ever be characterized as random or unauthorized. The Seventh Circuit held that the relevant inquiry was whether those employees' actions were random and unauthorized from the *state's perspective*, regardless of the level of the employee in the governmental hierarchy. In other words, a random act by a high ranking state employee who has disregarded the state's formal policy or established procedure does not necessarily translate into a deprivation of due process. The process provided by the state *as a whole* must be examined. Thus, there is a distinction between a claim which challenges the adequacy of the state's policy or procedure itself and a claim that a high ranking state official disregarded otherwise adequate process.

Only when the state has delegated the power to make policy and procedure to a specific policymaker, and that policymaker establishes procedure on an informal case by case basis without any formal policy or procedural guidelines from the state, can that policymaker's random and unauthorized actions be attributed to the state itself. *Id.* at 1472.

After concluding that a high ranking official's conduct can be random and unauthorized, the Seventh Circuit proceeded to apply *Parratt* to determine whether the post-deprivation procedures available comport with due process. The Seventh Circuit noted a number of legal theories available under Illinois law which would provide relief to Easter House, concluding that adequate state remedies existed to correct any injuries which may have resulted from improper conduct. Under the principles of *Parratt*, that is sufficient enough to provide adequate due process. *See also, Thornton v. Barnes*, 890 F.2d 1380, 1389 (Moody J. 1989) (holding that state tort remedies are sufficient post-deprivation relief to satisfy due process).

Under the reasoning of *Easter House*, it becomes very important to examine the procedures of the state as a whole, as well as the underlying basis for the due process claim. The analysis is very different if the claim is that the state's procedures as a whole are constitutionally inadequate than it is if the argument is that a state official failed to follow otherwise constitutionally adequate procedures.

The Fourth, Fifth and Sixth Circuits have subsequently interpreted this aspect of *Parratt* as meaning that, if a state system by procedure and ordinary practice, does in fact provide a party with due process, there is no violation of the Fourteenth Amendment merely because of a random deprivation without the hearing required under state law. *See Holloway v. Walker*, 790 F.2d 1170 (5th Cir. 1986); *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988); *National Communications Sys. Inc. v. Michigan Public Service Comm'n.*, 789 F.2d 370 (6th Cir. 1986).

In the case before the Court, Churchill's due process claim is that the hospital's policy requires supervisors to provide notice and an opportunity to present their case and discuss their point of view. Thus, the claim is *not* that the state's procedures themselves are constitutionally inadequate but rather that Waters, Davis and Hopper failed to follow the established policy. Such a claim is not cognizable under § 1983 if there are adequate post-deprivation remedies, per *Easter House* and *Thornton*.

Plaintiff argues that because the hospital's policy provides Hopper with the authority to make a final and binding decision, there are no adequate remedies. This argument ignores the state law remedies which were found adequate in both *Easter House* and *Thornton*. Because Illinois law provides at least one remedy (breach of em-



ployment contract, *see Duldulao*) Churchill has adequate post-deprivation remedies to satisfy due process concern.

This conclusion is consistent with the policies which underlie *Parratt* and *Easter House*. Both of those cases stemmed, at least in part, from the Court's concerns that § 1983 not be allowed to become a font of tort law. Here, where the state does not provide a cause of action, allowing Plaintiff to proceed with her constitutional claim would be inconsistent with that concern.

Thus, the individual Defendants' Motion for Summary Judgment on the due process claim (Count II) is granted either because the Plaintiff has not established and cannot establish that an employment contract was created by the policy handbook, or because Illinois provides a meaningful post-deprivation remedy which satisfies due process.

**BREACH OF CONTRACT**

The *Duldulao* analysis is identical under the Plaintiff's state law claim for breach of employment contract as it was under her due process claim. Absent proof that the handbook contained clear premises which indicated an intent to bind the parties, no contract was created.

Thus, for the same reasons as stated above, Defendants' Motion for Summary Judgment relating to the state law claim for breach of employment contract (Count IV) is granted.

**FIRST AMENDMENT**

Because of the existence of material factual disputes, Defendants are not entitled to summary judgment on the

First Amendment claim. The Motion for Summary Judgment on Counts I and III is therefore denied.

This case is hereby set for a telephonic status conference with Magistrate Kauffman on March 12, 1990. The Court will initiate the call.



## NOTES OF CHERYL R. CHURCHILL REGARDING MEETING WITH STEPHEN HOPPER ON FEBRUARY 6, 1987

I met with Mr. Hopper on Friday, Feb. 6, 1987 at 9:30 A.M. Mrs. Magin was also in attendance at the meeting.

After the initial polite conversation Mr. Hopper said that he had received my letter, and that he wanted to preface our meeting by stating that he wanted our discussion to be limited to the issues at hand, and he did not want us to "get off the track." He said he wanted to be told of the events that that were pertinent to my complaint. As far as I can recall, neither he or Mrs. Magin ever mentioned the words firing, termination, or discharge. Mr. Hopper opened the discussion by stating that he was interested in hearing what I had to say about my *first* warning—the one having to do with a C-section. (There was only *one* warning!) He also said he wanted to hear my comments regarding the comments Cindy had written on my last evaluation. (I got the impression that he was trying to classify my last evaluation as a second warning from Cindy. I definitely did *not* receive a warning from Cindy at that time, *nor at any other time*, except for the *one* written warning that I got on August 24th). Mr. Hopper also said he wanted to know about the incident regarding my talking about Cindy and Mrs. Davis, with negative overtones one evening while working in OB with a cross-trainee working the same shift with me.

Before discussing the specifics that Mr. Hopper outlined, I voiced some of my concerns regarding the cross-trainee program and its faults and shortcomings. I told him that I thought there were serious problems in OB—one of them was assigning people, still in orientation, to fill staffing

slots when necessary. I advised him that the use of inexperienced staff indicated to me that there was no apparent regard to the *quality* of nursing care that was being provided—that they were assigning numbers, *not* quality. Mr. Hopper just looked at me and said he didn't want to get into that, and asked me again about the events of the August 21st C-section. He said he wanted to know if it was my duty or my assignment to be in the delivery room during the emergency C-section. I explained to him that emergencies are not planned they just happen and when a life and death emergency presents itself everyone in the dept. is responsible for doing whatever is necessary to ensure the patient and her unborn child, that we will do all within our power to deal with the situation in a manner that will, hopefully, bring about a happy ending to the crisis. I explained to him that when I became aware of the situation and also aware that things were not being adequately or correctly done in order to bring about the fastest and most efficient care to the patient, I took over and, more or less, directed others to do things that needed to be done while I took care of doing the things that needed to be done first, and were of utmost importance. I told Mr. Hopper that I felt my performance was that of a highly skilled professional and I was glad that I had been there to help. I also told him that I had not been asked to leave the room twice by Cindy—only once!

We talked about Cindy's comments on the evaluation that I received on Jan. 5th. When I talked of the evaluation I reminded him that the evaluation was very good—that there was no reason for me to be fired. I advised him that I had received nothing but good evaluations since I started working. I told him that I began working at MDH, in OB, nearly 4½ years ago and had never had an incident occur in which anyone ever questioned my



nursing judgement. He asked me if any one had *ever* said anything negative about my nursing care, or had anyone ever accused me of *not* being a *very good nurse*. I said, "No." He said "Well, that's not the issue then, so I think we'd better stick to the issues and not discuss things that are not at issue here."

I reminded him that I had not been given a written reason for my termination. He made no comment as he looked over his notes. After a moment he stood up, and said that he would review my grievance and that I would be notified, by mail, of his decision.

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